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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 31

NORTON I. KRETSKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER, NORTON I. KRETSKE

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To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

I.

Opinion of the court below.

Opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 116 Fed. (2d) 690. The opinion is in the Record at page 1117 thereof.

II.

Jurisdiction.

The jurisdiction of this Court is founded upon Section 347 (a), Title 28, Judicial Code, Section 240(a), as amended by Act of February 13, 1925; and Rule 11 of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

The dates of judgment and denial of petition for rehearing: The date of the judgment to be reviewed is December 13, 1940. (Rec. 1140.) The petition for rehearing was denied January 23, 1941. (Rec. 1239.) Certiorari was granted by this Court on April 7, 1941.

III.

Statement of the case.

The Record shows that on "the 29th day of September, A. D. 1934, was 'filed in the Clerk's Office of said Court a certain indictment, in words and figures, to-wit.'" This indictment contained two counts. (Rec. 2-37.) Count 1 was withdrawn by the Government on an election to stand on Count 2. (Rec. 100.) Count 2 attempted to charge a conspiracy to defraud the United States, in violation of Title 18, Section 88 of the United States Code (R. S. 5440; May 17, 1879, C. 8, 21 Stat. 4; Mar. 4, 1909, C. 321, Sec. 37, Stat. 1096).

The defendants in this indictment, including petitioner, filed a motion to quash the indictment, which was overruled. (Rec. 42.) They then filed demurrers thereto (Rec. 42-5[9]), which were on the 16th day of November, 1939, overruled. The petitioner entered a plea of not guilty to this indictment. (Rec. 95.) The defendant

Kretske moved for a directed verdict in his favor at the close of the Government's case, and at the close of all the evidence, which motion was denied, and exception taken to each ruling. (Rec. 99, 100.) The jury found the petitioner guilty. (Rec. 101.) He moved for a new trial, which was overruled. (Rec. 104.) He was sentenced to imprisonment for 14 months. (Rec. 104.) He appealed to the Circuit Court of Appeals for the Seventh Circuit, which Court on December 13, 1940, sustained the said judgment of the District Court for the Northern District of Illinois, Eastern Division. Petition for re-hearing was denied on January 23, 1941. (Rec. 1239.) Petitioner's petition for writ of certiorari was granted by this Court on April 7, 1941.

IV.

Statement of fact.

No effort will be made here to make a statement completely summarizing the evidence introduced for and against the petitioner. Suffice it to say, that the testimony of the Government was mainly that of accomplices, whether indicted, or unindicted, and it was characterized by inconsistency, contradictoriness, and such lack of convincingness, as would ordinarily render it impotent to convince a jury. It was further uncorroborated by any but accomplice witnesses, who in their attempted corroboration, generally contradicted each other. This type of testimony would be insufficient to support a verdict in the Eighth Circuit, as shown by the cases of *Sykes* v. *U. S.*, 204 Fed. 909, and *Dahly* v. *U. S.*, 50 Fed. 37. As these cases have been rejected in both the Second and in this, the Seventh, Circuit, it could be argued that there is presented such conflict of authority in regard to such evidence as to bring the case within the orbit

of the certiorari jurisdiction of this Court. This view, however, is not here pressed. It is put forward merely to emphasize the inescapable conclusion that the evidence against petitioner was of a borderline character, and any substantial error made by the Court or prosecutor in the course of proceedings would inevitably be reversible error.

We, however, submit the following view of petitioner's position, which though sketchy and not complete, will serve, we believe, to shed light upon the legal points later argued in his behalf in this brief.

Petitioner, Norton I. Kretske, was an attorney in private practice at the time of the return of the indictment in this cause. (Rec. 798.) He referred certain cases involving violations of the Internal Revenue Law to petitioner Alfred E. Roth. (Rec. 799-815.) Roth was an attorney who specialized in that field. (Rec. 833.) Kretske had never tried a criminal case. (Rec. 816.) The Government sought to prove the conspiracy charged in the alleged indictment by mere unsupported statements of certain convicted and self-confessed habitual law violators that they had given money to Kretske for the alleged purpose of corrupting petitioner Glasser. All of the above was denied by Kretske (Rec. 799), as well as by Glasser. (Rec. 912.)

The Government's case in the main rests upon the violators' interpretation of the phrase "take care of the case." It will be noted that the phrase "take care of the case" is used by the violators interchangeably with the phrase "fix it". (Rec. 297, 300.)

The Government's testimony, as above observed, was contradicted by its own witnesses in all material instances. As the other petitioners are expected to set out in detail these contradictions, it will suffice for the

purpose of illustrating the above, to set out but one of such instances. The Government sought to involve Kretske in the receipt of certain monies which had been paid by one Abesketes to one Brantman. Brantman had taken $3,000.00 from Abesketes, for which he had given Abesketes a receipt. (Exhibit 134, Rec. 651.) The receipt was in words and figures as follows: "Received of Nick Abesketes on account of services the sum of $3,000.00. Signed, William Brantman, 10 North La Salle Street." Brantman testified that he rendered no services for Abesketes (Rec. 651); that he received the money from Abesketes to give to Kretske, who, he understood, was to be the legal representative of Abesketes. (Rec. 652.) Brantman testified that Abesketes made the appointment himself for the meeting. (Rec. 651.) Abesketes on the other hand, testified that Brantman, a total stranger to him, called and suggested that he come to Chicago. (Rec. 664.) Abesketes testified that he gave Brantman the money to prevent an indictment. (Rec. 667.) Abesketes further testified that he did not know Kretske; that he never had any connection with him, either legal or illegal. (Rec. 671.)

Petitioner Kretske testified in his own defense. (Rec. 790-822.) In his testimony he denied categorically the alleged statements attributed to him by certain of the Government's witnesses. As above observed, whenever the Government made an attempt to prove statements by Kretske by the self-confessed criminals, there was present irreconcilable contradiction on the part of these criminals.

The attitude of the trial judge, which is made the basis of many assignments of error, which will be discussed at length later in this brief, is demonstrated quite strikingly by his questions and statements during the

cross-examination of certain Government witnesses and during the cross-examination of petitioner. Illustrative of this action would be the conduct of the trial Judge during the testimony of a witness for the prosecution, one Stanley Slesur, an inmate of a United States Penitentiary. This witness (Rec. 623) was questioned by the prosecutor as to whether or not he had gone to the Tribune Building for the purpose of seeing petitioner or for the purpose of inserting an ad in the Chicago Tribune. The witness stated that he had come to the Tribune Building for the purpose of inserting an ad. This was contradictory of the answer of Stanley Wasielewski (Rec. 631), another Government witness, who had not yet testified, but who the Government knew was going to testify that Slesur went to the Tribune Building for the purpose of seeing Kretske. Up to this point in the trial there was no showing that Slesur had visited Kretske's office. The Court, however, took up the cross-examination of this witness, and in a hostile manner warned the witness in effect that it would be better for him if he would testify that he did not go to the Tribune Building for the purpose of inserting an ad, but for the purpose of calling on Kretske. Illustrative of this point, we set forth the examination of this Government witness by the trial Judge (Rec. 625):

> "The Court: Listen, what we want here is the truth, and nothing but the truth. Do you understand that?
>
> A. Yes, sir.
>
> Q. If you testify falsely on this stand, it may be a much more serious offense than the one you are here on now. I want you to tell the truth, and nothing but the truth. If you went to the Tribune Building for some other purpose, say so.
>
> The Court: I want to ask him a question. Did you go to the Tribune Building that day for the purpose of inserting an ad?

A. Yes, sir.
Q. You did?
A. Yes, sir.

The Witness: From the Tribune I decided I wouldn't put the ad in, and went home. At that time there were two indictments pending against me, Spring Grove and Wilmington. I can't remember now what Stanley Wasielewski did when I got to the Tribune Building. I parked my car in a parking lot on Dearborn Street. We put the car over there together.

The Court: We will take a recess at this time. (Whereupon a recess was had.)"

After the recess this witness resumed the stand and changed his testimony. (Rec. 625.)

Another instance where the Judge made an erroneous statement derogatory and fatal to the defense was during the cross-examination of petitioner Kretske. Petitioner had testified that he had referred a number of alcohol cases to Roth for trial. (Rec. 799, 815.) The trial judge at this point in the trial interrupted the cross-examination of petitioner to state a rhetorical question:

"In the average case there is nothing difficult about the trial of any of those (alcohol) cases."

This conveyed to the jury the impression that since there was nothing difficult about the trial of alcohol cases, Kretske should have tried them himself. The jury were further led to believe that the referring of a case by one lawyer to another was an illegal act. That the trial of alcohol cases involves divergent and conflicting theories of law cannot be denied. The Solicitor General will doubtless concede that petitions for Certiorari are filed in the Supreme Court of the United States in cases involving violations of the alcohol law in greater proportion to cases arising under any other federal statute. This court has also seen fit to grant petitions for Certiorari in

numerous cases involving violations of the alcohol tax laws.

The Court had already been advised that Roth was a specialist in federal practice and as such had been engaged by many lawyers practicing in and about Chicago to represent their clients in cases involving violations of the Federal Statute. (Rec. 749, 796, 889, 890, 783.)

V.

Specification of errors.

A. The Circuit Court of Appeals for the Seventh Circuit erred in holding that petitioner was not denied due process of law because the grand jury which returned the indictment against him was illegally constituted and void, because of the intentional, total exclusion of the female sex from the jury box from which grand jurors were drawn.

B. The Circuit Court of Appeals for the Seventh Circuit erred in holding that petition was not illegally put to trial upon a record which shows that the indictment, which is the basis of the charge against him, was not returned into open court.

C. The Circuit Court of Appeals for the Seventh Circuit erred in holding that it was proper to put petitioner to trial on an indictment which failed to inform him of the nature and cause of the accusation against him, against his demurrer, asserting particularly these specifications:

(a) The count upon which he was convicted failed to charge any crime against the laws of the United States.

(b) This count was based upon the conclusions of the pleader, and failed to set forth with reasonable certainty any facts from which said conclusions could be drawn.

(c) This count was so vague, indefinite, uncertain and ambiguous that it failed to allege the ultimate and issuable facts of a conspiracy.

(d) The indictment was so vague, indefinite, uncertain and ambiguous that it would not afford petitioner protection from another charge of the very same kind against him.

D. The Circuit Court of Appeals for the Seventh Circuit erred in holding that it was not error to totally and systematically exclude from the jury box females who were not members of a private League of Women Voters, and who had not, as members of this League, attended certain jury classes maintained for the purpose of giving instructions to potential jurors, in which lectures the views of the prosecution were presented, and to exclude persons otherwise possessed of the requisite qualifications for jury service.

E. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the admission in evidence of Government's Exhibits 81A and 113, severally, containing hearsay and highly inflammatory statements, was not a denial of the right of confrontation with the witnesses whose statements appeared in said Exhibits.

F. The Circuit Court of Appeals for the Seventh Circuit erred in holding that petitioner was not denied a fair and impartial trial, and denied the benefit of the presumption of innocence, by the activities of the trial judge.

G. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the trial judge did not impose such a limitation of the right of cross-examination as (a) to fatally prejudice petitioner, and (b) to constitute a denial of due process of law.

H. The Circuit Court of Appeals for the Seventh Cir-

cuit erred in holding that it was not reversible error to examine the witnesses for the defendants beyond the time and subject matter embraced in the direct examination, the effect and purpose of the cross-examination being the showing of matter against the defendants, which, if proved at all, should have been proved by the Government as part of its case in chief; the impeachment of the witnesses, showing commission of crimes not felonious nor involving moral turpitude, and for the further purpose of adducing facts favorable to the Government, without the Government making the person a witness for itself, touching upon the matters upon which cross-examination was conducted.

I. The Circuit Court of Appeals for the Seventh Circuit erred in holding that it was not error to permit the prosecutor, (a) by leading questions persistently put testimony into the mouths of accomplice witnesses vital to the prosecution, and fatal to the defense, and thus substituted his testimony for that of an accomplice witness; (b) upon cross-examination to repeatedly put to a defendant while on the stand, absolutely unnecessarily, the same question in regard to a material matter; (c) after he went partially into a matter on examination in chief the judge to refuse, upon the objection of the prosecutor, to permit the defendant to inquire further into the matter; further erred (d) in holding that it was not reversible error, after the prosecutor had turned over to the defendant witnesses for cross-examination, on re-examination not to confine himself exclusively to the matter developed in cross-examination; further erred (e) in holding that it was not reversible error for the trial court to permit the prosecutor to continuously introduce evidence out of the usual order without showing good and exceptional cause for doing so; further erred (f) in

holding that it was not reversible error for the prosecutor to refuse the right of the defendant Glasser to examine a material Government document which was relied upon by the Government, and which was in the sole possession of the Government; and further erred in holding that the collective effect of each of these rulings did not work reversible error to the petitioner.

J. The Circuit Court of Appeals for the Seventh Circuit erred in holding that it was not reversible error (a) for the trial court to admit in evidence a prejudicial act disconnected with the conspiracy charged; (b) to admit in evidence against the petitioners a highly prejudicial statement, act or declaration made by another alleged conspirator after the determination of the alleged conspiracy; and (c) to exclude important evidence operating in behalf of the petitioners.

VI.

ARGUMENT.

Summary of Argument.

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Petitioner was denied due process of law because of a discriminately selected grand jury from which females, having the right to serve as grand jurors, were purposely excluded 19

Point II.

The record failed to show that the indictment herein was returned into open court, the entry "filed in open court" being for all effective legal purposes one that the indictment was not returned into open court 20

Point III.

The indictment was bad because (1) it was so vague, indefinite and uncertain that it failed to advise petitioner of the charge it contained with reasonable particularity as to persons, time, places, and circumstances; (2) owing to this vagueness, etc., it could not be successfully pleaded in a second prosecution for the same offense, in violation of the Fifth Amendment to the Constitution of the United States; (3) it offends against that provision of the Sixth Amendment to the Constitution of the United States, which provides that, "in all criminal prosecutions, the accused

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t. The Court seizing upon a statement by Government witness Swanson that petitioner Kretske told him that it was "hot in the Federal Building," collaborated with the prosecutor in this sketch:

"The Court: What is that? It was hot over in the Federal Building, or something like that?"

To which interlocution there was this answer from the prosecutor:

"That is not climatically speaking; you do not mean that, do you, Judge?"

Then, explanatorily, but not interlocutorily, the Judge to the witness:

"What do you understand to mean, by the heat was on?"

"A. Well, the heat was on them.

"By that what do you mean?

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Point I.

The petitioner was denied due process of law because the grand jury which returned the indictment was illegally constituted and void, because of the intentional, total exclusion of the female sex from the jury-box from which the grand jury were drawn, the state law making it mandatory that women be placed on the jury list. (Reasons, Petition, pp. 4-5.)

Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1075.
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757.
Smith v. *Texas*, 311 U. S. 128, 85 L. Ed. 106, 108.
U. S. v. *Standard Oil Co.*, 170 Fed. 988, 993-995.
U. S. v. *Murphy*, 224 Fed. 554, 566.
Crowley v. *U. S.*, 194 U. S. 461, 48 L. Ed. 1075.
People v. *Mack*, 267 Ill. 481.
People v. *Wolfe*, 352 Ill. 109.
People v. *Cochran*, 313 Ill. 508.
People v. *Schraeberg*, 347 Ill. 392.
People v. *Green*, 329 Ill. 576.
People v. *Mankus*, 292 Ill. 435, 438.
People v. *Lembke*, 320 Ill. 553.
Marsh v. *People*, 226 Ill. 464.
Sec. 25, Chap. 78, Ill. Rev. Stat. (set out in Appendix, p. 87).
Sec. 1, 1939 Ill. Rev. Stat., p. 1929.
Sec. 2, 1939 Ill. Rev. Stat., p. 1933.

The section of the statute above cited requires that the names of women be placed in the jury box to be drawn for jury service. The laws of the United States require the Federal Grand Jury of the Northern District of Illinois, Eastern Division, to be drawn in the same manner. (*Crowley* v. *U. S.*, 194 U. S. 461, *supra; U. S.* v. *Murphy*, 224 Fed. 554, 566, *supra.*) There was no attempt to com-

ply with the mandatory provision of the law requiring the names of women jurors to be placed on the jury lists and drawn for grand jury service. This, upon the foregoing authorities, made void the grand jury which returned the indictment in question.

Point II.

The petitioner was illegally put upon trial upon a record which absolutely fails to show that the indictment, which was the basis of the charge against him, was returned by the grand jury into court. (Reason 2, Petition, p. 4).

Renigar v. *U. S.*, 172 Fed. 646 (C. C. A. 4).
Green v. *State*, 19 Ark. 178.
Feiker v. *State*, 54 Ark. 489.
Holcomb v. *State*, 31 Ark. 427.
Goodson v. *State*, 29 Fla. 511, 524-26, 10 S. Rep. 738, 36 A. S. R. 135.
Samson v. *State*, 124 Ga. 776.
Jackson v. *State*, 21 Ind. 79.
Heacock v. *State*, 42 Ind. 393.
Laura v. *State*, 26 Miss. 175.
Hardy v. *State*, 1 Tex. Ct. App. 556.
Simons v. *Commonwealth*, 89 Va. 156.
Chappel v. *State*, 16 Tenn. (8 Yerger) 166.
U. S. v. *Levally*, 36 Fed. 687.
Kelly v. *People*, 37 Ill. 157.
Yundt v. *People*, 65 Ill. 373.
Aylesworth v. *People*, 65 Ill. 373.
People v. *Gray*, 261 Ill. 140.

The Government, in its brief resisting the application for certiorari, thus stated its position in regard to this assignment of error:

"Petitioners contend (Glasser, pp. 26-28; Kretske,

pp. 13, 20; Roth, pp. 26-28) that the record fails to disclose that the indictment was returned in open court by the Grand Jury, and that, hence, the District Court erred in overruling their motion to quash, made on that ground. (R. 42, 141-149, 151.) We submit that the Circuit Court of Appeals correctly held this contention to be without merit. (R. 1118-1119.)

"The placita (R. 1) discloses the convening of the District Court for the Northern District of Illinois, Eastern Division 'on the first Monday of September (1939) (it being the twenty-ninth day of September the indictment was filed),' and recites the presence of the various judges of the Court, including District Judge Stone, who sat as a member of the Court by designation, and who tried the instant case, the Marshal, and the Clerk. On the face of the indictment in the Clerk's own handwriting 'Filed in open court this 29 day of September, A. D. 1939, Hoyt King, Clerk,' preceded by the notation 'A true bill filed. A true bill, George A. Hancock, Foreman.' (R. 38.) *These records*, which, of course import verity, sufficiently disclose, in our opinion, that the indictment was returned by the Grand Jury in open court."

The Government then attempts to nullify the case of *Renigar* v. *U. S.*, 172 Fed. 646, 647 (C. C. A. 4), *supra*, by this assertion:

"It will be seen that in contrast with the clerk's entry 'filed' in *Renigar* v. *United States*, 172 Fed. 646, 647 (C. C. A. 4th), cited by the petitioners, the entry of the clerk in the instant case was 'Filed in open court'. Obviously, if the indictment had not been returned in the usual manner, but had been merely handed by the foreman of the grand jury to the clerk, the clerk's entry would simply have been that the indictment was 'filed', as in the Renigar case. There is no proof that the indictment was not returned in open court."

Against this view, the authorities on this particular subject have established a "tradition, unbending and inveterate", to use the words of the late Justice Cardozo.

Every authority cited on this point rises invincibly against it. We shall consider but a few of these.

In *Holcomb* v. *State*, 31 Ark. 427, the very same entry as was made in the instant case appeared in the record and the Supreme Court dealt with it in precisely the same way as the Court did in the *Renigar Case*, 172 Fed. 646, *supra*. We quote the exact language of the court:

> "There was an entry as follows: 'Be it remembered, that on the 20th day of April, 1876, the following indictment was filed, which is, in words and figures, to-wit:' Then follows the indictment thus endorsed: *'Filed in open court, April 20th, 1876. Jo Holcomb, Clerk,' but it in no way appears that the indictment was delivered in court by the grand jury, or that any indictment into court by them, or that they were in court for any purpose during the term at which the indictment purports to have been found.*
>
> "This is a fatal defect, in a record involving life or liberty, as decided in *Green* v. *State*, 19 Ark. 178, where the point was fully discussed. For this error, the judgment of the court below must be reversed and the cause remanded, with instructions to arrest the judgment, set aside the verdict, and for further proceedings in accordance with law."

It appears further that the United States relies upon an alleged entry made by somebody, apparently on 11-7-39, showing the return of four indictments by the grand jury in open court. It does not identify the instant indictment, and by whom it was entered.

In *Felker* v. *State*, 54 Ark. 489, where there was a reversal because the record failed affirmatively to show that the indictment was returned into open court, the court said:

> "If the grand jury in fact returned the indictment into open court, that may be shown, and the record corrected by a *nunc pro tunc* entry; but if the indictment was not in fact returned into open court by the grand jury, it should be set aside, and the defendant

held to await the action of the grand jury. *No action can be taken in the matter of amending the record in the absence of the defendant.*"

In the case of *Green* v. *State*, 19 Ark. 178, followed by *Holcomb* v. *State*, 31 Ark. 427, *supra*, the court said:

"It is true that there is no record entry copied in the transcript showing that the grand jury did return the indictment into court. Nor is there any note by the clerk on the back of the indictment of its having been returned into court, and filed, as appears in the transcript. The special certiorari issued by the clerk of Bradley Circuit Court, above referred to, commanded him to return a transcript of the record of presentment and filing of the indictment, etc. But the return to the writ contains nothing but the caption entry above copied, and a bill of costs.

"In a detached certificate the clerk states that it appears from the minutes of the court that on the 15 of September, 1856, the foreman, in the presence of the grand jury presented the indictment in court, and it was ordered to be filed, which was accordingly done. This statement of the Clerk, of course, amounts to nothing. If there was any record of fact, he should have sent a certified transcript of that, as commanded by the writ of certiorari.

"• • • Though the requisite number of grand jurors consent to the indictment, and the foreman endorses it 'a true bill', it has no legal validity until it is returned into open court by the grand jury."

In *Laura* v. *State*, 26 Miss. 175, the Court at page 176 said:

"No person can be subjected to punishment for any offense unless a conviction be had upon an indictment found by a grand jury of the county in which the offense was committed. The record before us contains no statement which shows directly and positively that the indictment under which the trial took place was found and returned into court. This it is indispensable the record should show, by a distinct statement, which establishes the identity of the

indictment found by the grand jury, with that which is contained in the record.

In *Kelly* v. *People*, 39 Ill. 157, the Court at page 158 said:

> "The record in this case proceeds as follows, after giving the ordinary convening order of the court: 'This day, being the fourth day of said term of said court, the following indictment was filed in said court, to-wit:' This is all the record as to the finding of the indictment. It nowhere shows that it was returned into open court by a grand jury, or that it was even found by a grand jury. For ought that is disclosed by the record, the so-called indictment may have been placed upon the files of the court by some private person. The motion in arrest of judgment should have been sustained. *Gardner* v. *The People*, 20 Ill. 157."

Point III.

(See third reason for the allowance of the writ, page 4, Petition.)

A—The count of the indictment upon which conviction was had in this case is vague, indefinite and uncertain, and did not advise the petitioner of the charge which he had to meet with reasonable particularity as to persons, time, places and circumstances, and is therefore fatally defective.

B—Owing to this vagueness, etc., the petitioner was deprived of a fundamental right under Article V of the Amendments to the Constitution of the United States, which so far as applicable, provides that "no person for the same offense shall be twice put in jeopardy of life and limb", the indictment being so vague, etc., that the same could not be pleaded in a second prosecution of petitioner for the same offense.

C—It offends against the Sixth Amendment to the Constitution which provides that "in all criminal prosecu-

tions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation".

U. S. v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

U. S. v. *Britton*, 108 U. S. 205, 27 L. Ed. 698.

Pettibone v. *U. S.*, 148 U. S. 197, 37 L. Ed. 419.

U. S. v. *Hess*, 124 U. S., 483, 31 L. Ed. 516.

Asgill v. *U. S.*, 60 Fed. (2d) 78 (C. C. A. 4).

McKenna v. *U. S.*, 127 Fed. 88 (C. C. A ...).

Anderson v. *U. S.*, 260 Fed. 557 (C. C. A. 8).

Fleisher v. *U. S.*, 302 U. S. 218, 82 L. Ed. 208.

Bartkus v. *U. S.*, 21 Fed. (2d) 425 (C. C. A. 7).

Middlebrook v. *U. S.*, 43 Fed. (2d) 244 (C. C. A. 5).

Brown v. *U. S.*, 21 Fed. (2d) 827 (C. C. A. 5).

Brown v. *U. S.*, 299 Fed. 10 (C. C. A. 3).

Hilt v. *U. S.*, 279 Fed. 421 (C. C. A. 5).

Conrad v. *U. S.*, 127 Fed. 798 (C. C. A. 5).

Sala v. *U. S.*, 104 Fed. 544 (C. C. A. 9).

U. S. v. *Murphy*, 50 Fed. (2d) 455 (D. C. S. D. Ala.).

U. S. v. *Eisenminger*, 16 Fed. (2d) 816 (D. C. Dela.).

U. S. v. *Geraci*, 280 Fed. 256 (D. C. S. D. Fla.).

U. S. v. *Dowling*, 278 Fed. 630 (D. C. S. D. Fla.).

U. S. v. *Sam Wing*, 254 Fed. 500 (D. C. N. D. Calif.).

In re Benson, 58 Fed. 962 (C. C. A. Calif.).

U. S. v. *Milner*, 36 Fed. 890.

U. S. v. *Reichelt*, 32 Fed. (2d) 152 (C. C. Calif.) (opinion by Justice Field of the United States Supreme Court).

Commonwealth v. *Hunt*, 4 Metcalf (Mass.) 111, 36 Am. Dec. 346.

D—The indictment, if the inducement and means alleged are urged as the charging part of it, is fatally

duplicitous, in addition to being subject to the same infirmities allged under A, B and C hereof.

Creall v. *U. S.*, 21 Fed. 690 (C. C. A. 8).

Ammerman v. *U. S.*, 216 Fed. 326 (C. C. A. 8).

Bratton v. *U. S.*, 73 Fed. (2d) 795 (C. C. A. 10).

U. S. v. *Armstrong*, 265 Fed. 683, 695 (D. C. Ind.).

U. S. v. *Am. Naval Stores Co.*, 186 Fed. 592 (D. C. Ga.).

U. S. v. *Dembowski*, 252 Fed. 894.

E—The indictment also leaves a doubt in the mind of the Court concerning the offense intended to be charged, and therefore is fatally defective for uncertainty.

Bratton v. *U. S.*, 73 Fed. (2d) 795, *supra.*

F—The indictment, construed with the inducement and the means alleged, also alleges a case where concerted action is necessary to constitute a substantive offense, and hence a conspiracy in regard thereto cannot legally exist; and, is, therefore, fatally defective.

U. S. v. *Sager*, 49 Fed. (2d) 725 (C. C. A. 2).

U. S. v. *Hagan*, 27 Fed. Supp. 814 (D. C. Ky., June 2, 1939).

U. S. v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298.

U. S. v. *Dietrich*, 146 Fed. 664.

The charging part of the count of the indictment upon which conviction was had, and which is the subject of this attack, is to be found at page 28 of the Record, and will be stated verbatim later in this argument. We assert that this sole charging part of the indictment, when tested by the foregoing authorities is fatally vague, insufficient, indefinite, general, and lacking in essential fact averments. As a result, petitioner was deprived of the fundamental rights above referred to, as this analysis of some

of the cases cited under this point, we believe will make manifest.

In *U. S.* v. *Cruikshank*, 92 U. S. 452, 23 L. Ed. 588, *supra*, this Court thus states the determinative rule regarding such an indictment:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *U. S.* v. *Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 539, that "Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition: but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

This rule was applied by the Circuit Court of Appeals for the Sixth Circuit in *McKenna* v. *U. S.*, 127 Fed. 88, *supra*, under this same statute, which provides:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free

> exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, * * * shall be, etc."

The indictment in that case, though infinitely more ample in its fact averment and particularization, was held fatally bad on demurrer. The indictment pleaded in considerable detail the means by which the conspiracy was to be effected, but the Court held that this did not aid the indictment, as these means did not constitute any part of the offense. The Court at page 91 said:

> "When the fact which is made by the statute an essential element of the crime is a collective or general one, it is necessary to specify the particular thing intended to be charged. This for several reasons: (1) To enable the court to see whether the particular fact is of the character intended by the general language of the statute—this is the province and duty of the court, and cannot be passed over by the conclusion of the pleader; (2) to apprise the respondent of the particular fact intended to be charged, in order that he may come prepared to meet it, and not be compelled to array a defense to all manner of charges which might be comprehended in the general words of the statute; and (3) that it may be known what the judgment covers, and to what extent it is a bar to further prosecution. *Cruikshank* v. *United States,* 92 U. S. 542, 23 L. Ed. 588.
>
> "It would be difficult to find a case more fit for the application of this rule, for the rights and privileges enjoyed by the public under the laws and Constitution of the United States are manifold. This indictment does not allege (what is sought to be attributed to its language) that the right or privilege was that of voting for a member of Congress. It is true it states that certain things were done by the conspirators in pursuance of the plot. But this is no part of the offense. All that can be said of it is that it furnishes an inference as to what the conspiracy was. But this does not meet the requirement of proper pleading, the rule being that the offense must be directly charged, and cannot be made out by infer-

ence or implication. *United States* v. *Britton, supra; Pettibone* v. *United States, supra.* How is it to be known whether the things alleged to have been done were in pursuance of the conspiracy? The conspiracy itself not being pleaded, the court cannot judge whether the things done have relation to it. It is the inference of the pleader. In the latter part of the indictment this mode of pleading is repeated. After alleging that an election was being held, it is charged that the defendants conspired with others for 'the purpose aforesaid.' This must refer to the purpose of injuring the persons named in the exercise of a right secured to them, stated in the earlier part of the indictment, to which we have already referred, for no other purpose is 'aforesaid.' Then, next, it is alleged that, 'in pursuance of said conspiracy,' and to carry it out, the defendants did certain things, which are enumerated, as evidential facts in proof that what they did tended to injure the voters in the exercise of their right or privilege to vote. It is obvious that this is only a repetition of the charge of a conspiracy to injure some right (not stated) secured, etc., and of the allegation of things done in pursuance of it. The cases above referred to seem decisive in respect of the sufficiency of this indictment."

In *Anderson* v. *U. S.*, 260 Fed. 557 (C. C. A. 8), the Court had before it a conspiracy indictment of a generality similar to that characterizing the indictment in the instant case. "The charging part", said the Court, "was as follows:

> "That (defendants' names omitted), on the 8th day of November, in the year 1917, in said division of said district, and within the jurisdiction of said court, did then and there unlawfully, willfully and feloniously conspire, confederate and agree among themselves to commit an offense against the United States; that is to say, to steal from a certain railroad freight car certain goods then and there moving and constituting a part of an interstate shipment of freight, with intent then and there to convert said goods to their own use."

The Court, after citing the *Cruikshank, Britton and Pettibone cases* (92 U. S. 542 and 108 U. S. 205, 148 U. S. 197, respectively) and stating the rule they asserted, applied it to this indictment at page 558, the Court said:

> "Standing alone, we are of the opinion that the above-quoted language from the indictment wholly fails to comply with the rules of criminal pleading. To illustrate: the words 'certain railroad freight car' might apply to any one of the vast number of freight cars in existence in the United States, or in the world, for that matter; and for the same reason the words 'certain goods' might apply to any kind of the thousand varieties of property. The car of goods might be moving in interstate commerce on any railroad in the United States and between any two of the great number of towns existing in different states. The word 'steal', as used in the statute, is used as equivalent to the word 'larceny'. In order to establish the crime of larceny several elements must be established. The defendant, if convicted or acquitted on this indictment, could not plead the conviction or acquittal in bar, as far as the indictment was concerned, if he was again indicted for the same offense, because the offense was not identified. We are therefore clearly of the opinion that the charge of conspiracy is fatally defective when standing alone."

The Court then examined the matters alleged as means or overt acts alleged as executed pursuant to the charged conspiracy, and held that they could not be permitted to aid the indictment; consequently it was fatally defective.

It will be seen that the Court followed on this point, among other cases, *U. S.* v. *Britton*, 108 U. S. 199, 27 L. Ed. 698, in which the Court at page 205, 108 U. S., said:

> "The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy. The provision of the stat-

> ute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be sufficiently charged and it cannot be aided by the averment of acts done by one or more of the conspirators in furtherance of the acts of the conspirators."

The Supreme Court in this case (Britton Case) passed upon the same statute involved in the instant case, namely, Title 18, Section 88, which is as follows:

> "If two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The Supreme Court Cases heretofore cited are relied upon by the Circuit Court of Appeals of the Fourth Circuit in *Asgill* v. *U. S.*, 60 Fed. (2d) 780, in considering an indictment under the same statute, an indictment very much in its frame and allegations like the one in the instant case; and it was for the reasons we here urge held bad. At page 784 the Court said:

> "While given full effect not only to the letter but to the spirit of the statute, it must be read in connection with the Sixth Amendment to the Constitution, which requires that the defendant be informed of the nature and cause of the accusation, this information to be set out through an indictment by the grand jury as guaranteed in the Fifth Amendment. Neither the statute nor the decisions was or were intended to qualify or amend, nor could they qualify, amend, or set aside these provisions of the Constitution. As was well said in the case of *State* v. *Van Pelt*, 136 N. C.

633, 49 S. E. 177, 180, 68 L. R. A. 760, 1 Ann. Cas. 495 (a conspiracy case): 'No offense is so easily charged and so difficult to be met unless the defendants are fully informed of the facts upon which the state will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not in harmony with the genius of a free people, living under a written constitution. We can see no good reason why an exception to the general rules of criminal pleading should be made in favor of this crime.' The essential and not merely technical requirements of indictments under the guaranties of the Constitution in general and as to conspiracy charges in particular have been outlined in almost countless cases that have reached the Supreme Court and other courts, and there is practical unanimity in these decisions. As stated in *Pettibone* v. *United States*, 148 U. S. 197, at page 202, 13 S. Ct. 542, 545, 37 L. Ed. 419: 'The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital'—citing *United States* v. *Hess*, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516. In the case of *United States* v. *Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588, after reiterating the constitutional right of the accused to be informed of the nature and cause of the accusation, the court quotes with approval the cases of *United States* v. *Mills*, 7 Pet. 142, 8 L. Ed. 636, and *United States* v. *Cook*, 17 Wall. 174, 21 L. Ed. 538, to the effect that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged,' and that 'every ingredient of which the offense is composed must be accurately and clearly alleged,' and that 'it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it

must state the species; it must descend to particulars' —citing 1 Arch. Cr. Pr. and Pl. 291. And for this reason, 'facts are to be stated, not conclusions of law alone.' In *United States* v. *Robinson et al.* (D. C.) 266 F. 240, after citing numerous cases, the court quotes from Bishops New Criminal Procedure, § 331, to the effect that the facts in allegation must be the primary and individualizing ones. See also, 3 Foster Fed. Pr. § 497, p. 2633."

In *Larkin* v. *U. S.*, 107 Fed. 697, *supra,* an indictment was held fatally bad which charged the use of the mails, in violation of Rev. St. 5480, as amended by Act of March 2, 1889, because it failed to charge a scheme to defraud the public generally or a class not capable of being resolved into individuals, but clearly importing an intention to defraud definite individuals, not described by name, nor a good and sufficient reason given for their omission. This case is founded upon *U. S.* v. *Hess,* 124 U. S. 483, 31 L. Ed. 416, *supra.* All the other cases cited upon this point are to the same effect, and deal with indictments charging conspiracy of the same type and character as the instant indictment, and in each case the indictment was held bad for the reasons there urged and which we urge here.

Applying the foregoing authorities to the charging part of the count of the indictment we are assailing, we have these allegations, seeking to charge an offense under a statute phrased in terms of the utmost generality. Of course, it is needless to add that the emphases interspersed in the charging part of the indictment are ours. This count alleges that the defendants, "well-knowing the premises aforesaid, in the City of Chicago in the State and District aforesaid, and at other places to the grand jurors unknown, heretofore, on to-wit, March 15, 1935, and thereafter continuously up to the date of the return of this indictment, in violation of the provisions of Sec-

tion 88, Title 18 of the United States Code of Laws, did willfully, unlawfully and feloniously conspire, combine, confederate and agree together, and with each other, and with divers other persons to the grand jurors unknown, to defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States (what courts?) by a United States Attorney or an Assistant United States Attorney to prosecute certain delinquents (what or what class of delinquents?) for crimes and offenses cognizable under the authority of the United States (what crimes: most crimes are cognizable by the states alone) as the same should be presented and determined according to law and justice, (determined by whom or what body?) free from corruption, improper influence, dishonesty or fraud (no facts to show what these terms consisted of), more particularly its right to a conscientious, faithful and honest representation of its interests in certain suits, controversies, proceedings, matters, actions, and causes (what are these?) brought and pending in the United States District Courts in the Northern District of Illinois (brought by whom and pending in what courts of the Northern District of Illinois?); that is to say, by promising, offering, causing and procuring to be promised and offered, money and other things of value to an officer of the United States (what officer?), and to persons acting for and on behalf of the United States (what persons or class of persons?) in an official function (what official function?), under and by authority of a department and office of the Government of the United States (what department or office, for they are legion?), with intent to influence his decision and action on certain questions, matters, causes and proceedings which were at times pending, and which were by law brought before such officer or officers in his or their official

capacity (what were these certain questions, matters, causes and proceedings, and who was the officer or who were the officers?), and with the intent to influence such officer or officers to commit and aid in committing, and to collude in committing certain frauds on the United States, (what were these certain frauds?) and to induce such officer or officers to do and to omit from doing certain acts (what acts?) in violation of his or their lawful duty (what was their lawful duty?)."

Testing these allegations by the foregoing authorities as above observed, it is clear that they are fatally defective, for the reasons therein stated.

But if it is sought to support the indictment by extending its charging part to the matters pleaded by way of inducement, embraced by Paragraphs 1 to 13 and Paragraphs 15 to 39, which paragraphs are connected together by this allegation at pages 34 and 35 of the Record:

> "That the persons whose names appear in paragraph 12 of this indictment are the persons referred to in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 33, 34 and 35 of this indictment as 'certain persons hereinafter referred to' which said paragraph 12 is incorporated in the paragraphs mentioned immediately aforesaid by specific reference hereto, the same as if said names appeared therein";

such effort would clearly fail.

It would take up too much space to reduce to the most narrow compass conceivable the allegations or statements of what we call the inducement and the means thus connected. Suffice it to say, all the allegations are clearly reducible to a charge of violations of Title 18, Section 91. These statements or allegations in substance are that both Glasser and Kretske during the time covered by the indictment, were Assistant United States Attorneys for the

Northern District of Illinois, and as such, at all times covered in this indictment, had certain decisions to make and actions to take on certain questions, matters, causes, and proceedings which were from time to time pending and which were from time to time brought before him in the performance of their official duties. (Rec. 22, 23.)

After charging the alleged conspiracy we have been considering, it is alleged at page 29:

> "That the conspiracy, combination, confederation, and agreement aforesaid was to be accomplished in the manner and means following:"

These means summarized were these:

1—Paragraph 15 alleges that money was to be solicited to be promised to Daniel D. Glasser and Norton I. Kretske, to corrupt them "in their official capacity in their decisions and actions on certain questions, matters, causes and proceedings which were at a certain time or times covered by this indictment by law brought before said Daniel D. Glasser and Norton I. Kretske in their official capacity for their decision and action."

2—Paragraph 16 is substantially the same as the preceding paragraph.

3—Paragraph 17 alleges the defendants were to solicit money to influence these persons, with the intent and purpose that they, said defendants, would accept and use said money "to corruptly, wrongfully, and improperly influence the said Daniel D. Glasser and Norton I. Kretske, defendants, to dishonestly and wrongfully, and in violation of their lawful duty, aid the defendants in committing a certain fraud on the United States."

4—Paragraph 18. That certain persons referred to would be solicited to promise certain sums of money to the defendants, Daniel D. Glasser and Norton I. Kretske, to

be used to corruptly and wrongfully influence the said Daniel D. Glasser and Norton I. Kretske "to collude in a fraud on the United States."

5—Paragraph 19. The same charge is repeated here, except the purpose was to "corruptly, wrongfully and improperly influence the said Daniel D. Glasser and Norton I. Kretske to allow a fraud to be committed on the United States."

6—Paragraph 20 alleges that the money was to be solicited "to corruptly, wrongfully and improperly influence the said Daniel D. Glasser and Norton I. Kretske in their official capacity to dishonestly, wrongfully, and unlawfully make opportunity for the commission of a fraud on the United States."

7—Paragraph 21 charges an agreement to solicit money, "with the intent to use said money to corruptly, wrongfully, and improperly induce the said Daniel D. Glasser and Norton I. Kretske to do certain acts in violation of their lawful duties as Assistant United States Attorneys."

8—Paragraph 22 charges that money was to be solicited "with the intent to use said money to corruptly, wrongfully, and improperly induce said Daniel D. Glasser and Norton I. Kretske in their official capacity to omit to do certain acts, in violation of their lawful duty as Assistant United States Attorneys."

9—Paragraph 23 charges that money was to be solicited to be promised to be paid to the defendant Daniel D. Glasser, in his official capacity aforesaid, with the intent to corruptly, wrongfully, and improperly influence the said Daniel D. Glasser "to dishonestly, wrongfully, and unlawfully collude in a fraud on the United States."

10—Paragraph 24 charges that money was to be solicited to be promised to be paid to the defendant, Daniel

D. Glasser, "in his official capacity aforesaid, with the intent to corruptly, wrongfully, and improperly influence said Daniel D. Glasser to allow a fraud to be committed on the United States."

11—Paragraph 25 charges that money was to be solicited to be promised to be paid to the defendant, Daniel D. Glasser, "in his official capacity aforesaid, with the intent to corruptly, wrongfully and improperly influence said Daniel D. Glasser to dishonestly, wrongfully, and unlawfully make opportunity for the commission of a fraud on the United States."

12—Paragraph 26 charges that money was to be solicited to be promised to be paid to the defendant Daniel D. Glasser in his official capacity aforesaid, and with the intent "to corruptly, wrongfully, and improperly induce said Daniel D. Glasser to dishonestly, fraudulently, and unlawfully do certain acts in violation of his lawful duty as Assistant United States Attorney."

13—Paragraph 27 charges that money was to be solicited to be promised to be paid to the defendant, Daniel D. Glasser, in his official capacity, "with intent to corruptly, wrongfully, and improperly induce said Daniel D. Glasser to omit to do certain act or acts in violation of his lawful duty as an Assistant United States Attorney."

14—Paragraph 28 charges that money was to be solicited to be used "to corruptly and wrongfully induce and persuade the said defendants, Daniel D. Glasser and Norton I. Kretske, to unfaithfully discharge their duties toward the United States as Assistant United States Attorneys, and that they, the defendants, would be found not guilty and discharged."

15—Paragraph 29 charges that money was to be solicited to be promised to be paid to said Daniel D. Glasser and Norton I. Kretske in their official capacities "to cor-

ruptly and wrongfully induce the said Daniel D. Glasser and Norton I. Kretske to make their decision so that they, the said persons, would not be charged with a violation of the laws of the United States."

16—Paragraph 30 charges that money was to be solicited which was to be promised to be paid to the defendants, Daniel D. Glasser and Norton I. Kretske, in their official capacity, "to cause them, the said Daniel D. Glasser and Norton I. Kretske, to unlawfully commit a fraud on the United States by going before the United States Commissioner and making a certain legal motion to dismiss said charges."

17—Paragraph 31 charges that money was to be solicited to "induce said Daniel D. Glasser to withhold from the Grand Jury certain facts establishing their connection with the alleged offense which said grand jury was inquiring about, and as a result of said failure on the part of the defendant, Daniel D. Glasser, to properly perform his lawful duty, the Grand Jury would not have before it sufficient facts to legally warrant their returning a true bill against said persons and they would be compelled to return a no bill."

18—Paragraph 32 charges that money was to be solicited to be used "to influence said Daniel D. Glasser so that he would corruptly render his judgment and decision affecting the prosecution of said persons."

19—Paragraph 33 charges that the defendants, with the exception of Glasser, would contact certain persons "hereinafter named who were defendants in certain criminal proceedings wherein the United States was plaintiff and they, the said persons, were defendants, and in form said defendants that for certain sums of money paid to them they, the said defendants, would corruptly influence said defendant, Daniel D. Glasser, who did appear from time to

time in the various court rooms before the various District Judges representing and acting for and on behalf of the United States in his official capacity in the causes and proceedings affecting the persons hereinafter named, to delay, continue, and unduly prolong said proceedings to the end that the various witnesses called to testify in said causes and proceedings would become discouraged and disheartened and would cease to have interest in said proceedings and would fail to remember the parties defendant or the part they took in said violation and as a result thereby the said trial and proceedings would be unduly delayed and a fraud would be committed on the United States."

20—Paragraph 34 charges that all of the defendants except Glasser would contact persons about to be or who believed that they were about to be charged with a violation of the laws of the United States, and inform them "that for a certain sum of money paid by the said persons referred to as aforesaid, they would make certain arrangements with the said Daniel D. Glasser to the end that the said charges made or to be made against said person or persons charged, to be charged, or who believed that they were to be charged with violating the laws of the United States, would not be made or brought against them by the United States."

21—Paragraph 35 charges that all of the defendants except Glasser would contact certain persons and solicit money from them which was to be paid to Daniel D. Glasser "to influence him in his official capacity in his decisions and actions on the certain questions, matters, causes, and proceedings which were brought or to be brought against the said persons, that is to say, it was part of said conspiracy that the said Louis Kaplan, Anthony Horton, otherwise known as Tony Horton, and Norton I. Kretske,

would contact said persons and tell them that for a certain sum of money paid to them they would arrange with the said Daniel D. Glasser that he, Glasser, do certain acts in violation of his, the said Daniel D. Glasser's, lawful duty as an Assistant United State's Attorney, and they would promise said persons that they, said persons, would be held harmless from prosecution.

22—Paragraph 36, as we have seen, seeks to connect the inducement with these allegations.

23—Paragraphs 37 and 38 alleges in the most general terms certain other acts to be executed and performed pursuant to the alleged conspiracy, such as meetings, discussions, concerning information in regard to it and its various phases and stages.

It will thus be seen, from this analysis, that these allegations are more general than those contained in what we term the charging part of the indictment. They are controlled by the authorities above cited, and like it, must fall if it can be admitted that they may be invoked to aid this charging part.

But conceding, only for the purpose of this immediate discussion, that they may be considered as allegations of an offense against the United States, they contain the language, not of Section 88, Title 18, but that of Section 91, Title 18, which is as follows:

> "(Criminal Code, Section 39.) Bribery of United States officer—Whoever shall promise, offer, or give or cause or procure to be promised, offered, or given any money or thing of value, or shall make or tender any contract, undertaking, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, *to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the government thereof * * * with intent to influence his de-*

cision or action on any question, matter, cause or proceeding which may at any time be pending, or which may be by law brought before him in his official capacity, or in place of trust or profit, or with intent to influence to commit or aid in committing, or collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be," etc.

It will be noted that the allegations we have immediately been considering are in the very language of this act, repeated over and over again, and if they may be considered as charging any offense, which is denied, they can be considered as charging a conspiracy to violate not Section 88, *supra*, but Section 91, *supra*. Testing these allegations by the facts pleaded, we have an attempt to charge in this count a conspiracy to defraud the United States in violation of Section 88, *supra*, an attempt to charge a conspiracy to commit an offense against the United States under the same statute, considered in connection with Section 91, *supra*.

Notwithstanding the pleader states in the count that it is brought under Section 88, *supra*, this must yield to the words employed in charging the offense; for in determining the validity of an indictment, the facts alleged and not statutes mentioned by the pleader determine what, if any, statute is violated. (*Williams* v. *U. S.*, 168 U. S. 382, 42 L. Ed. 509; *Outlaw* v. *U. S.*, 81 Fed. (2d) 805 (C. C. A. 5).

This indictment is further defective in that it attempts to allege a crime where concerted action is necessary to accomplish the substantive offense, which is the alleged object of the conspiracy, hence a conspiracy to commit it could not exist. Therefore, it was fatally defective in this respect. (See authorities cited above under this point, especially *U. S.* v. *Sager*, 42 Fed. (2d) 725.)

And, as above shown, the indictment also attempts to charge in one count two separate offenses, and is therefore fatally defective, as being duplicitous. (See authorities cited upon this point.)

And, further, as the indictment must leave a doubt in the mind of the Court concerning the exact offense intended to be charged, it is fatally defective for uncertainty. (*Bratton* v. *U. S.*, 73 Fed. (2d) 795 (C. C. A. 10), *supra.*)

Point IV.

The total, systematic exclusion from the trial jury box of females who were not members of a private League of Women Voters, and who had not, as members of this League, attended certain jury classes maintained for the purpose of giving instructions to potential jurors, in which lectures the views of the prosecution were presented, and the exclusion of females who otherwise possessed all of the requisite qualifications for jury service, constituted a denial of the constitutional right of trial by an impartial jury. (Reasons, Petition, p. 5.)

Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1035.
Pierre v. *Louisiana*, 306 U. S. 254, 83 L. Ed. 757.
Smith v. *Texas*, 311 U. S. 128, 85 L. Ed. 106.
U. S. v. *Standard Oil Co.*, 170 Fed. 988, 993-995.
U. S. v. *Murphy*, 224 Fed. 554, 566.

In *U. S.* v. *Standard Oil Co.*, 170 Fed. 988, Judge Anderson, at p. 995, said:

> "I don't feel under all the circumstances that the jury selected in this panel would be entirely unobjectionable. I don't mean that there is anything in the composition of it, so far as the individual men are concerned, that can be reasonably objected to; but, however this thing happened, I don't like the looks of it. I don't see any reason why the qualified jurors, peo-

ple who are qualified to be jurors, resident in Cook County, should be systematically left out of this box. I think that the jury commissioner, in putting the names in the box, ought to put in a fair proportion of qualified voters from this county. I don't want to start this trial feeling myself that something is not quite fair. I don't want to start in the trial with the defendant and its counsel feeling that there is something not quite fair about it. I feel that we ought to start fair and keep fair. At least we ought to begin fair, and I think this panel ought to be set aside."

In *U. S.* v. *Murphy*, 224 Fed. 554, the Court said, in discussing the same point:

> "Jury lists should, so far as possible, be free from suspicion or criticism. Confidence in our courts and honest administration of the law could not otherwise be maintained."

Point V.

The admission of Government's Exhibits 81A and 113, severally, containing, as each did, rankest hearsay and highly inflammatory statements, is a denial of the right of confrontation with the witnesses whose statements appeared in said Exhibits. (Petition, p. 5.)

A—The reception in evidence of irrelevant, prejudicial, hearsay documents is reversible error.

Cook v. *U. S.*, 138 U. S. 157, 184, 34 L. Ed. 908, 913.

U. S. v. *Dressler*, 112 Fed. (2d) 972 (C. C. A. 7).

Hass v. *U. S.*, 93 Fed. (2d) 427, 436 (C. C. A. 8).

Greenbaum v. *U. S.*, 93 Fed. (2d) 113, 125, 126, 127 (C. C. A. 9).

Paddock v. *U. S.*, 79 Fed. (2d) 872, 873, 874 (C. C. A. 9).

Brady v. *U. S.*, 39 Fed. (2d) 312, 314 (C. C. A. 8).

Naftger v. *U. S.*, 200 Fed. 494, 499, 500 (C. C. A. 8).

Pharr v. *U. S.*, 48 Fed. (2d) 767 (C. C. A. 6.)
People v. *Goltra*, 2 Pac. (2d) 35 (Cal. App.).
State v. *Leopold*, 110 Conn. 55, 65, 147 Atl. 118.
Commonwealth v. *Lucreiti*, 295 Pa. State 191, 199, 145 Atl. 85.
Averitt v. *State*, 84 S. W. 482.
State v *Rombolo*, 99 Atl. 434.
People v. *Pellanzo*, 207 N. Y. 560.
Cheney v. *State*, 7 Ohio 222.
People v. *McGraw*, 66 App. Div. 372.
Baker v. *State*, 120 Wis. 135, 148, 149.

B—Where a prejudicial ruling is made against or prejudicial inadmissible evidence is introduced against one alleged co-conspirator, it is likewise prejudicial as to all other alleged co-conspirators charged with that offense in the same indictment.

Logan v. *U. S.*, 144 U. S. 263, 36 L. Ed. 429.

C—This error could not be cured by any subsequent instructions to the jury.

Waldron v. *Waldron*, 156 U. S. 361, 39 L. Ed. 453.
Throckmorton v. *Holt*, 180 U. S. 552, 55 L. Ed. 663.
Holt v. *U. S.*, 94 Fed. (2d) 90, 94 (C. C. A. 10).
C. M. Spring Drug Co. v. *U. S.*, 12 Fed. (2d) 852.

Exhibit 81A is a report of the Internal Revenue Service, Alcohol Tax Unit, dated July 14, 1937, case 4570-M, pertaining to Victor Raubunas, Louis Kaplan, Adam Widzes, *et al.*, concerning premises at 2524-34 South Western Avenue, Chicago, Illinois, with seizure list, together with statements of witnesses. It contains the rankest hearsay, setting forth that a man giving the name of L. Davis, later identified as Louis Kaplan, ordered four tons of coal delivered to a building with a high smoke stack at

2524 South Western Avenue. That he continued to place orders periodically up to and including May 15, 1936, at which time orders totalling 450 tons had been placed. That a still had been set up in this building. It further states that Frank Hill, to be used as a Government witness knew Kaplan for three years previous to this date. That he did not see him until the still began to operate at 2524-36 South Western Avenue, November, 1935, to June, 1936. During the period the still was operating Kaplan came to Hill's office several times. That James Brown while working at 2534 South Western Avenue, saw Kaplan come from the still room, also saw Government witness Raubunas, Clem Haydock and Edward Jawor, employees of the Pulaski Coal Company, identified Kaplan as L. Davis who had ordered coal delivered to the building with the high smoke stack at 2534 South Western Avenue. Murray Ellis saw Kaplan around the premises. Lawrence Craven saw Kaplan meet with other defendants in his gas station at 3915 Ogden Avenue. Exhibit 81A further contains the recommendation that Frank Hill, Murray Ellis and James Brown be allowed to testify on behalf of the Government. While they are more or less reluctant witnesses, it is the belief of the investigators that if they are requested to appear at the office of the United States Attorney before the trial they will testify favorably. That Lawrence Craven is also a reluctant witness and it is recommended that the same procedure be followed with him. Exhibit 81A continues as follows:

> "Louis Kaplan, 3125 W. 19th St., Chicago, Ill., male, white, Jewish descent, age 55, height 5 feet 8 inches, weight 215 pounds, stocky build, married, citizenship not known, owns and operates the Kaplan Motor Sales Company, 3152 Ogden Ave., Chicago, Ill. (Automobile sales agency for the Nash car.) Reported to be worth approximately $200,000.00, criminal record not known with exception of his reputa-

tion as a bootlegger in Chicago, Illinois. (A Louis Kaplan was arrested at 616 West Madison St., Chicago, Ill., for violation of the National Prohibition Act on May 10, 1923, and sentenced to pay a fine of $300.00; a man by the same name was also arrested by Chicago police officers February 7, 1935, together with one Edward Dewes, in connection with the killing of Teny Pinna and seriously wounding Vito Messino at Louis Kaplan's garage, 3152 Ogden Ave., Chicago, Ill., in which Louis Kaplan stated he was a victim of an attempted kidnapping and was released.)"

Exhibit 113 is a report of the Internal Revenue Service, Alcohol Tax Unit, Chicago, Illinois, dated July 2, 1937, their own case No. 4957-M, concerning violation of internal revenue laws by carrying on business of a distiller, by possession and control of a still, etc., at Spring Grove, Illinois, by Louis Kaplan, Victor Raubunas, Edward R. Dewes, Stanley Slesuraitis, Joseph F. Cole, Louis Pregenzer, Lincoln Rankin, Ralph Bogush, Joe Fernandez, and Ceil Simms, containing narrative history of evidence, seizure, statements of witnesses, chemist's report, with finger print reports of Louis Kaplan, Lincoln Rankin and Louis Pregenzer. In substance, it sets forth that Louis Kaplan is implicated by Peter Frett; that Kaplan took part in the negotiations for a lease in the old Borden Milk Plant. That he was present at the first conversation. That he went to the office with Dewes and returned to the tavern. That the person identified from pictures as Kaplan gave Dewes alias Schwahn, the money to pay for the rental of the plant. That Kaplan came to one Schnitzler's office at a lumber company in November and December of 1936, accompanied by Dewes, Slesur and Cole. That orders for coke were placed and Kaplan guaranteed payment for orders placed by any of the parties. That Sylvester Urbanski identified Louis Kaplan as visiting the prem-

ises of the Highway Tavern in Fox Lake, Illinois. That Joseph Cole says Kaplan inspected the premises in October, 1936, for erection of an illicit distillery. That he was present when Louis Kaplan gave some money to Edward Dewes who in turn gave it to Peter Frett, at which time Kaplan stated he had obtained a lease for the milk plant in Spring Grove. That Kaplan gave him instructions to purchase coke and deliver to the milk plant. Kaplan instructed him to arrange for board and room for the men who would be employed at the still and will pay him forty or fifty dollars a week for his assistance in obtaining the lease, ordering coal and boarding employees. That he heard Louis Kaplan instruct Stanley Slesur to change one of the valves and one of the steam pumps after the still was in operation. That Kaplan agreed to deliver to him 1250 gallons of alcohol as a reward for his services. That the records of the Illinois Bell Telephone Company show many calls from Fox Lake 97 to Crawford 6663, which is listed in the name of Mrs. Jenny Kaplan, 3125 W. 19th Street. That Peter Frett says he was paid $2500.00 by Louis Kaplan; that Joe Cole says Frett got $500.00 for his business and $25.00 or $30.00.

Said Exhibit 113 contains the following recommendation by agents:

> "It is recommended that Defendant Cole, Fernandez and Simms be used as a witness for the government in order to strengthen the evidence against the principals Kaplan, Raubunas, Dewes and Slesur. The last four named defendants have long been identified with illicit alcohol activities in the Chicago area, and owing to their methods of operation it has been very difficult to obtain evidence for an arrest and conviction."

This Exhibit contains the same description of defendant Louis Kaplan as was appended to Exhibit 81A.

When it is recollected that Kaplan was a co-defendant in this case, and any legal evidence introduced against him would be identically the same as the legal evidence introduced against any other defendants, there remains no ground of contention that the introduction of these two exhibits was not prejudicial and reversible error as to each petitioner in this cause.

Summarizing the decisions from other jurisdictions above cited: It is a matter of general knowledge that rogues gallery pictures are taken of persons arrested for crime. (*People* v. *Goltra*, 2 Pac. (2d) 35 (Cal. App.), *supra.*) It is error to admit rogues gallery pictures where the descriptive matter is not thoroughly eliminated, and even where the descriptive matter is thoroughly eliminated, the picture is admissible solely for the purpose of identification, where identification is in issue. (*State* v. *Leopold*, 147 Atl. 118, 110 Conn. 55, 65, *supra; Commonwealth* v. *Lucreiti*, 295 Pa. State 191, 199, 145 Atl. 85, *supra.*) If there is no issue as to the identity of a co-defendant, the Government under no circumstances should be permitted to introduce his photograph. (*Averitt* v. *State*, 84 S. W. 482, *supra.*) Where a rogues gallery picture has been admitted containing prejudicial matter on the subject, the prejudicial matter contained on the photograph amounts to hearsay, and admission of the same is reversible error. (*State* v. *Rombolo*, 99 Atl. 434, *supra.*) It is reversible error upon the part of the Government to show that the defendant associated with criminals, when such is not probative of any fact in issue. (*People* v. *Pellanzo*, 207 N. Y. 560, *supra; Cheney* v. *State*, 7 Ohio 222, *supra;* and *People* v. *McGraw*, 66 App. Div. 372, *supra.*) It is clear that these exhibits were as to the appellant "*res inter alios acta*," and the admission of the same constituted reversible error. (*Baker* v. *State*, 120 Wis. 135, 148, 149, *supra.*)

In *State* v. *Leopold, supra,* 147 Atl. 118, 110 Conn. 55, 65, it was held that a rogues gallery photograph with the numbers on the front, and the records on the back covered with paper, were properly received in evidence for the purpose of identifying an accomplice; but as the defendant tried to show the records contained on this picture, an objection was properly sustained to this, as the picture was not the proper way of proving this record.

In *State* v. *Rombolo,* 99 Atl. 434, *supra,* this question was clearly decided. In it the court followed the fundamental principle that lies at the basis of the administration of criminal jurisprudence, and held that the admission of a rogues' gallery picture offended against this principle in the most obvious and definite form. The facts of this case were, briefly: in a prosecution for murder, a photograph of the defendant, purporting to have been taken while he was incarcerated in a Pennsylvania Reformatory, stating on its back that the original was in confinement under a charge of burglary, and that he had violated his parole, was introduced in evidence. It was held this was error, because the photograph thus stamped and characterized was inadmissible, the statement on the same being hearsay. On this point the Court said:

> "The state produced and introduced in evidence, over the objection of the defendant, a photograph which was said to have been taken of him while he was incarcerated in a Pennsylvania Reformatory. Upon the back of this photograph were certain indorsements, among them that the original thereof was in confinement under a charge of burglary, and that he had violated his parole. We are unable to see that the photograph had any probative value, and consider that, had the contrary been the fact, the indorsements written upon it destroyed its efficacy as an instrument of evidence, for those statements are the veriest hearsay, coming from an unknown source, and not made under the sanctity of an oath. We conclude that

this photograph should have been excluded upon the objection of the defendant."

The Cases cited merely illustrate and confirm this elementary proposition and apply the elementary principle presented in the foregoing cases. They hold (1) that the admission of evidence of *"res inter alios acta"* of a serious character constitutes reversible error; (2) that serious hearsay is reversible error; that the acts, declarations, statements, or confession of a co-conspirator are not admissible, unless the act is done pursuant to the transaction charged in the indictment, and the confession is made in the presence of the accused. It will thus be seen upon this point the petitioner was deprived of those fundamental safeguards which for centuries the law has accorded every person charged with crime, regardless of who he is.

Point VI.

The trial judge, in questioning witnesses for the defense, was not calmly judicial, dispassionate and impartial. He participated in the trial with illegal and prejudicial activity, and not only failed sedulously to avoid all appearance of advocacy, but became an active advocate for the Government. By such attitude he clearly and definitely conveyed to the jury that the defendants were guilty as charged. Further, by his repeated cross-examination of defense witnesses, and in such casting aside and violating the rules on that subject, as applied to the District Attorney, deprived the appellant of a fair and impartial trial. (Petition, p. 6.)

Franz v. *U. S.*, 62 Fed. (2d) 737, 739 (C. C. A. 6).

Hunter v. *U. S.*, 62 Fed. (2d) 217, 220 (C. C. A. 5).

Adler v. *U. S.*, 182 Fed. 464, 472 (C. C. A. 5).

Williams v. *U. S.*, 93 Fed. (2d) 686 (C. C. A. 9).

Conley v. *U. S.*, 46 Fed. (2d) 53, 54, 56 (C. C. A. 9).
Glover v. *U. S.*, 147 Fed. 426 (C. C. A. 8).
McNutt v. *U. S.*, 267 Fed. 671 (C. C. A. 8).
Rutherford v. *U. S.*, 258 Fed. 855 (C. C. A. 2).
People v. *Egan*, 331 Ill. 489, 163 N. E. 357.
People v. *Rongetti*, 331 Ill. 489, 163 N. E. 357.
People v. *Cunningham*, 195 Ill. 550, 63 N. E. 517.

The Judge's conduct thus made the basis of this specification may be thus summarized:

1—The Judge interfered with the re-direct examination of Elmer Swanson, a Government witness, and developed by answer to his question that the witness had heard that the defendant Horton had previously taken care of, fixed and manipulated cases, and that the witness thought Horton could similarly handle the case in which he was interested. A motion was made to strike the answer which this question elicited, but it was overruled. (Rec. 241.)

2—The Judge examined Frank Hodorowicz, a co-conspirator, witness for the Government, and developed that Hodorowicz had talked to one Frank Miller, a stranger to the indictment and likewise to any legal connection with the evidence, and developed that Miller told the witness he could "take care" of his case for $800.00, which witness paid. Witness did not know whether Miller used the money or not. That this Miller was in the bootlegging business and not a lawyer. (Rec. 307-308.) After further questioning by the Assistant District Attorney, the Judge again questioned the witness, reverting to the Miller incident, and entered into the details of that transaction, and re-emphasized it by repeated questions. (Rec. 309-310.)

3—During the cross-examination of the witness Dewes, the Judge made the witness repeat his testimony to the

effect that the defendant Kretske (petitioner) had resigned under pressure. The Judge interfered with the cross-examination of Dewes in such a manner as to deprive the defendants of the right to a free and unrestricted cross-examination. (Rec. 545.)

4—The Judge interrupted the cross-examination of appellant Kretske by developing the fact that petitioner thought the trial of alcohol cases in the Federal Court involved some difficulty, and stated positively that there is nothing difficult in the trial of any of those cases, thus indicating his disbelief in the testimony of this witness. (Rec. 816-817.)

5—The Judge interrupted the direct examination of the defendant Roth, cross-examined him himself and by the nature of his questions and his attitude clearly indicated a disbelief of the testimony of Roth. Roth stated to Campbell that an agent named Bailey was going to get a number of United States attorneys, lawyers, and judges in trouble, and that he, Roth, had heard Campbell's name mentioned. The Judge then proceeded to cross-examine the defendant vigorously as to the source of his information and by the nature of his questions indicated an utter disbelief in the statements made by Roth. (Rec. 850-851.)

At pages 869-870 of the Record, the Judge cross-examined the witness, defendant Alfred E. Roth, beyond the scope of his judicial authority in regard to a record on appeal in a farm libel case that bore a very remote, if any, relation to the issue. At page 873, where Roth was being examined as to matters unrelated to his direct examination, his counsel objected on such grounds, to which objection the Judge retorted, "This is cross-examination."

6—Federal Judge Michael L. Igoe, witness for the defense, was asked by Assistant District Attorney Ward if he knew many of the defendants who had been arrested

and prosecuted by the Government, to which Judge Igoe answered he did not know certain of them. Then the Assistant District Attorney said, "That's the point; I say you didn't know them, but Mr. Glasser does know them." A motion was made to have this statement stricken. This the judge refused to do. (Rec. 908.)

7—The Judge cross-examined the defendant Glasser in regard to a certain Nick Abesketes as follows:

> "The Court: Did you know at that time that Nick Abesketes was under indictment in the Eastern and Western Districts of Wisconsin?
> A. No, sir.
> Q. Did you make any inquiry?
> A. No, sir; you see, my job was strictly to prosecute.
> Q. You were interested in getting Nick Abesketes?
> A. Yes, sir." (Rec. 941.)

8—At Rec. 943, the Judge re-emphasized this matter as follows: I think my impression was that there were two indictments pending in Wisconsin against Nick Abesketes on February 25, 1938. I will ask the District Attorney's Office to check with the Alcohol Division sometime during the day, to make sure about it.

9—At Rec. 1030, the Judge said: At my request, the Government has furnished me with this. Let the record show that Nick Abesketes was indicted in the Western District of Wisconsin on January 27, 1936, and that he was indicted in the Eastern District of Wisconsin on July 30, 1938. * * * To the indictment in the Western District he pled guilty and was sentenced. * * * After that the indictment in the Eastern District was dismissed. It covers the same subject. I know that for a fact. * * * I happen to know all about Nick Abesketes.

10—The Government witness Del Rocco was under examination touching the money he is alleged to have given

the defendant Horton to fix pending cases. The Judge interrupted and asked the witness the following questions:

"The Court: Did he tell you how he would use this $500.00?

A. That he had to give it to the boss.

Q. Did he tell you who the boss was?

A. He said 'the redhead'. That he would only get a couple of dollars out of it for his end for going out there, very little." (Rec. 243.)

11—During the examination of Government's witness Frank Hodorowicz (Rec. 297), the Judge, addressing himself to the witness said:

"Q. He said if Pete took ownership of the still, you would have the case discharged?

A. He said it cost $800.00, so that night I came over and went to the north side someplace. He said he had to deliver the money to Red, so we went to the north side, and he went in some lobby there and I went out in the corner to the saloon. He came back. He said everything is O. K. He said everything is taken care of for tomorrow morning.

The Court: Had you paid the money before you came back?

A. Yes, sir.

The Witness: The next morning Pete and Clem Dowiat were discharged. That was the evening of September 23.

The Court: Do you know?

A. Yes, sir.

Q. Whom did he mean when he referred to Red?

A. Glasser.

Q. The defendant in the case?

A. Yes, sir.

Q. You actually paid Kretske $800.00?

A. Yes.

Q. How did you pay it, in currency?

A. Yes, in cash."

12—During the examination of Government witness Anthony Hodorowicz (Rec. 348-349) the Judge examined

the witness in regard to what facts were brought before the United States Commissioner who was hearing the charge against the witness. He had the witness state that a full disclosure of the facts in the case was not made before Judge Woodward, before whom the case was heard. Witness was asked by the Judge whether Judge Woodward asked the witness any questions, whether any lawyer asked him any questions, and especially whether Mr. Glasser asked him any questions. The Judge then said:

> "So you don't know. Your recollection is that there was not a complete disclosure of all the facts that connected you with that case before the judge?"

Upon the witness being asked by one of counsel for the defense whether he understood the term used by the Judge, he stated that he did not, to which the Judge made answer:

> "I will ask you this. Did your lawyer, or Mr. Glasser, or anyone in your presence, in the judge's, make any statement to the judge about your conduct in relation to the still and the charge in the indictment?
> A. No."

This witness then proceeded to state on cross-examination that there were no facts connecting him with the still, and there is no fact that he could have told in regard to any connection with the still. Counsel's final question along this line was:

> "If they told the truth about you, all they could state was that you were in that neighborhood, and that they arrested you near the still, is that right?
> A. Yes.
> The Court: Did you hear them tell the judge that?
> A. No, I didn't." (Rec. 348-349.)

13—After the Government agent and witness Silvian White had been fully examined, cross-examined, and re-examined, the Judge, for the apparent purpose of re-

habilitating this witness, conducted the following examination:

"Q. Did you discuss or bring to the attention of Mr. Glasser a copy of that original affidavit?

A. Mr. Glasser had a copy of the original affidavit. I had discussed Mr. Frett's affidavit as well as the affidavit of Alfred Slesur, Cecil Simms, Lester Urbanski, who corroborated Joe Cole, at least in part or some parts of his testimony concerning Kaplan.

Q. If that other statement would correspond to the statement of the other witnesses—

A. That is true.

Q. You say now the statement of Peter W. Frett corresponded in detail with the statement of this other witness?

A. It corresponds in part.

Mr. Stewart: That is what I object to. He hadn't any right to say that.

The Court: Eliminate the word 'corroborate'; and we want to know if the statements are alike.

The Witness: Not exactly, no, sir. There is more detail in Joe Cole's statement than in the others.

Q. In Joe Cole's?

A. Yes, sir.

Q. Are there some statements in the Frett affidavit that are similar to the statements in the Cole affidavit?

A. Yes, sir, exactly.

The Court: I think that is sufficient." (Rec. 805.)

14—The Judge took the direct examination away from the Assistant District Attorney of the Government witness Swanson, who had testified that he and others charged with him had appeared before Judge Woodward, were represented by Roth, and the defendant Glasser represented the Government. They were told by Roth that the case would be continued until a certain day and upon that day the witness and others appeared, the case was continued, and the witness heard no more about it. At page 232:

"The Court: Did you pay a fine or anything of that kind?

A. No, we did not pay fine.
Q. The case just dropped out of mid-air?
A. Well, it dropped out.
Q. How long ago was that?
A. Well, that was in early part of 1938."

15—At 293-294, the Judge asked Commissioner Walker, who had testified favorably to the conduct of the defendant lawyers, this question:

"Q. Of course, all you observed was their conduct in your court room?
A. Oh, yes, surely."

16—Charles Ellis was a member of the grand jury and was examined, cross-examined and re-examined touching the conduct of the defendant Glasser before the grand jury. The Judge thus interfered with the re-direct examination:

"Q. Let me ask you a question. When Mr. Glasser appeared before the jury did he submit to you a report that he had obtained from any of the agents?
A. No, he had a report with him.
Q. Did he give it to the grand jury to examine?
A. No.
Q. Did he ask this man Cole anything about any interest Mr. Cole may have had in that still?
A. No."

17—May Jerkus, a witness for the Government, was directly examined by the Assistant District Attorney. She had been in defendant Glasser's office, talking about one Girardi, who was furnishing sugar for a still. The woman's husband had been convicted of operating a still. Mrs. Jerkus visited the District Attorney's office with her husband, who was in custody, and Glasser told her in effect that if they would disclose the name of the man who owned the still, her husband would be permitted to go home. At page 615 the Judge then proceeded to cross-examine this witness:

"The Court: Can you describe the appearance of Nick Girardi at that time?

A. He is about as tall as I am and heavy set.

The Court: Heavy set?

A. Heavy set fellow.

Q. What would you say his weight was?

A. I would say it was close to 200 pounds.

Mr. Ward: How tall are you?

A. Five feet, two.

The Court: About how old a man was he?

A. I would judge him to be about 40.

Mr. Ward: But he is the same Nick Garardi that was in the sugar business with Sol Tishman?

A. I know both of them.

Q. All right.

The Court: At the time you saw Mr. Glasser you knew him?

A. Yes, sir.

Q. You knew he was the man that furnished you with the furniture?

A. Yes, sir.

Q. Did you tell Mr. Glasser who he was?

A. I told him everything.

Q. Oh, you told Mr. Glasser?

A. Yes, sir. I told him just the whole story. How we came in from Oklahoma City and had no furniture and he gave us the furniture if he could put the still in the basement. I told him everything.

Q. You gave him the man's name?

A. Even the man's name."

18—Stanley Slesur, a witness for the Government, was directly examined by the District Attorney. He was at the time confined in the United States Penitentiary. In the course of this witness' testimony, the Judge said:

"Listen, what we want here is the truth and nothing but the truth. Do you understand?

A. Yes, sir.

The Court: If you are testifying falsely on this stand, it may be a more serious offense than the one you are here on. We want you to tell the truth and nothing but the truth. If you went to the Tribune for some purpose say so."

The Judge then proceeded to cross-examine the witness as to whether he went to the Tribune Building. Witness said that he went to the Tribune Building to see the defendant Kretske, but only for the purpose of seeking a loan on his house. The Judge proceeded to cross-examine the witness, at page 627:

"Q. You stated now, that you called at Mr. Kretske's office in the Tribune Building with reference to the sale of your home, is that right?

A. Yes, sir.

Q. Or to obtain a loan?

A. Yes.

Q. You had a three thousand loan at that time?

A. Four thousand.

Q. What need of money did you have at that particular time?

A. I needed it for my business.

Q. Did you attempt to raise money on your home any other place before you went to Mr. Kretske's office?

A. Couple of real estates.

Q. What real estate office did you call on?

A. On 63d Street near Kedzie. I couldn't recall the name.

Q. Was Mr. Kretske in the real estate business? Was he operating a real estate office at the time you consulted him?

A. I don't know.

Q. But you went there for that purpose?

A. Yes.

Q. Did you go there to consult him as a lawyer or as a real estate salesman?

A. Well, yes, there was a couple of more fellows, a real estate man and lawyer.

Q. Did you go to see Mr. Kretske as a real estate salesman or lawyer?

A. We went to see that young fellow and somebody talked about my property at the same time, and I met Mr. Kretske.

Q. How did you happen to find yourself in Mr. Kretske's office?

A. How did I find it?
Q. How did you happen to go to Mr. Kretske's office?
A. I was downstairs and I don't remember that fellow's name and I got upstairs to see Mr. Kretske. They told me to. I say what floor is he on, and that fellow, I don't know the name, Judge.
Q. You don't know his name?
A. Yes.
Q. And that is what you went up there for?
A. Yes, that is the truth.
The Court: All right, proceed."

19—Edward Wroblewski, an inmate of the Lewisburg Penitentiary was examined in chief by the Assistant District Attorney. He testified that the defendant Roth was his lawyer in a proceeding by the Government against him. He was asked how he came to retain Roth and said he could not tell. The Judge then proceeded to cross-examine this witness as follows (Rec. 644-646):

"A. I don't remember how I met Mr. Roth.
Q. How many lawyers have you hired in your lifetime?
A. Two.
Q. Who were they?
A. Three.
Q. Who were they?
A. Mr. Bolton, Mr. Roth and Mr. Gutsel.
Q. Did you hire Mr. Roth before you hired the other two?
A. After.
Q. After. Well, you must have some recollection of the circumstances concerning the employment of Mr. Roth. Now, tell us about it.
A. I don't quite understand your question.
Q. You know something about how you happened to hire Mr. Roth. Now tell us about it.
A. Well, I don't know. As I say, I don't remember how I got acquainted with Mr. Roth.
Q. How did you get acquainted with him?
A. I don't remember.

Q. When did you first see him? Where did you first see him? In his office?
A. Yes.
Q. How did you happen to go to his office?
A. I don't know.
Q. What is that?
A. I don't remember, your Honor.
Q. When was this?
A. After this trial in 1937, I think it was.
Q. In 1937?
A. Yes.
Q. Did somebody take you to his office?
A. I don't remember.
Q. How old are you?
A. Thirty-one.
Q. And what education have you had?
A. Two years high school.
Q. What is that?
A. Two years high school.
Q. And you don't want to tell us now how you got to Mr. Roth's office.
A. Your Honor, I don't remember.
Q. Why don't you remember? Is there any reason why you shouldn't remember?
A. No, no reason. I just don't remember.
Q. Did your brother take you up there?
A. I don't remember.
Q. How old are you now?
A. Past 31.
Q. How old is your brother?
A. Twenty-eight.
Q. You are 31?
A. Yes, your Honor.
Q. Mr. Roth represented you in Indiana?
A. Yes, sir.
Q. For the trial?
A. Yes, sir.
Q. And at that time you were convicted?
A. Yes.
Q. In a trial before the Court and jury?
A. Yes, your Honor.
Q. How much did you pay, Mr. Roth?
A. $250.00.
Q. $250.00. And you don't know now how you got to his office?

A. I don't know now how I ever got acquainted.
Q. Nobody recommended him to you?
A. No, sir. I don't remember whether it was a rumor about his name.
Q. What is that?
A. A rumor. I don't remember how I met Mr. Roth. (Rec. 644-646.)"

20—The witness Swanson (Rec. 230) testified that Kretske told him that the "heat was on", which the witness interpreted as meaning that it was hot over in the Federal building.

"The Court: What is that? It was hot over in the Federal Building, or something like that?
Mr. Ward (Assistant District Attorney): That is not climatically speaking; you don't mean that, do you?
The Court: What did you understand that to mean, by the heat was on?
A. Well, the heat was on them.
Q. By that what do you mean?
A. Well, that they were being watched, or something like that."

21—Clem Dowiat was a person who had been proceeded against criminally by the Government. He testified in regard to the procedure in his case before the United States Commissioner. The Judge interrupted the examination to ask the witness what he heard Mr. Glasser say at the hearing before the Commissioner. (Rec. 270.) Witness knew the defendant Roth. He had gone over to Roth's office with his uncle. He was asked why he stopped on the way at Kretske's office and said he didn't.

"Mr. Ward: Doesn't it refresh your recollection if I tell you you stopped at Mr. Kretske's office?
Mr. Stewart: Your Honor, I object to that. We are entitled to the witness' testimony.
The Court: All right, but this witness is a little reluctant. He is rather evasive at times. Objection overruled. He may answer.

The Witness: I don't get it.

Mr. Ward: Would it refresh your recollection if I were to tell you from there you went to Mr. Roth's office?

A. That might have been.

Q. Do you recall being indicted for that offense?

A. No, sir.

Q. What?

A. No, sir."

Examination by the Court (Rec. 273):

"Q. Never heard the word, did you?

A. No, sir.

Q. Never heard of anyone being indicted?

A. Oh, yes, sir.

Q. Sure you did. Don't try to evade and we'll get along faster. Now the Government has a lot of information about your conduct. You might as well answer without trying to evade."

On re-direct examination this witness was asked whether he could recall being before a judge with his uncle and Swanson. He answered yes. The judge then interfered as follows (Rec. 274):

"The Court: Do you remember what court you were in before what judge?

A. In front of Walker, Commissioner Walker.

The Court: That is the Commissioner?

Mr. Ward: Do you remember being in a court room similar to this that looked like this room?

A. No, sir.

The Court: Just mention the name of the judge.

Mr. Ward: Judge Woodward, you ask him that.

The Court: Were you in Judge Woodward's court room?

A. No, sir, Walker.

Q. Were you ever in Judge Woodward's court room?

A. Yes, sir. I was on a different case. You are getting me all mixed up. I don't know if I am coming or going.

Q. Just listen to the question. As far as you are

concerned, this is all water over the dam, so you might just as well answer the questions truthfully.
A. Yes, sir." (Rec. 274.)

22. Gordon Morgan, Chief Clerk of the United State's Attorney's Office, testified as to the result of a grand jury investigation. Of a certain grand jury in which the defendant Glasser represented the Government, he stated that there were twelve no bills returned. The Judge then questioned the witness (Rec. 196):

"Q. That is the total number of cases presented?
A. By Mr. Glasser.
Q. To this grand jury?
A. Yes, sir.
Q. And of the twenty, there were twelve no bills?
A. Yes, sir."

23. William Brantman testified (Rec. 659) for the Government that he had given the defendant Kretske some money for the purpose of influencing the conduct of the defendant Glasser in a case against a third person. Brantman and this third person flatly contradicted each other in material particulars as will afterwards be shown. As the record discloses, Grantman was at all times a willing witness, except insofar as the testimony would be highly prejudicial to him. At all times when it would injure any of the defendants without injuring himself, he was a most willing witness. Yet, we find this dialogue between the Judge and counsel for one of the defendants:

"Mr. Stewart: (Referring to the testimony of Brantman.) Your Honor, when Mr. Ward puts these convicts on, I don't object, but I know your Honor would rule that they were possibly a little reluctant, but he is not a reluctant witness.
The Court: The last two answers indicate he was a little reluctant. Objection overruled." (Rec. 659.)

24. Frank Hodorowicz testified for the Government (Rec. 541) and was by no means hostile, in fact, he showed

great energy that in his testimony he could be of the greatest service to the Government and thus benefit himself as a convicted criminal. Counsel for the defendant objected to the District Attorney's obviously leading the witness in the questions put. The Judge in answer to this objection stated that this witness was in a measure somewhat hostile, and it was proper to lead him at times. "If you can proceed without leading, do so, but if you have to lead, do so."

25. On cross-examination of the defendant Glasser by the Assistant District Attorney, the collateral matter of what schools Glasser attended was gone into by the examiner. The Judge then took up the cross-examination thus (Rec. 990-991):

"The Court: What education have you had to prepare yourself for the admission to the Bar?

A. I went to De Paul.

Q. How long did you go to De Paul University?

A. I went there, I think about a year or so.

Q. One year. Are you a graduate of high school? What high school did you graduate from?

A. I went to Lane High School.

Q. Did you graduate from high school?

A. No, I didn't graduate.

Q. How far did you go?

A. Well, I got my credits, you know.

Q. Then you went to De Paul for one year?

A. Yes, sir, then I went to Loyola.

Q. For how long?

A. About a year.

Q. And when you were at De Paul what did you study?

A. Law.

Q. And Loyola?

A. Law.

Q. And where else have you studied?

A. I have studied previously in a law office.

Q. In whose law office?

A. I can't think of his name right now.

Q. How long did you study in his office?

A. Oh, I studied in his office—

Mr. Ward: I can't hear you.

A. I studied for a couple of years in his office, I can't think of his name, it does not come to me.

The Court: What were the requirements at the time before you took the Bar examination?

A. I think three years you could have either law school, or study with a lawyer. I had the necessary qualifications.

Q. You took the Bar examination?

A. Yes, sir.

Q. Well, how long did you study in the law office?

A. Oh, I think I studied about two years, I don't remember.

Q. In whose law office did you study?

A. I can't think of the lawyer's name—it will come to me in a little bit. I have it at the tip of my tongue.

Q. Where was the office?

A. I think 69 West Washington Street.

Q. Miss McGarry was your secretary?

A. Yes, sir.

Q. And she made up this personnel record of Daniel D. Glasser?

A. Yes, sir. I didn't look at it at the time at all. I can tell you if there are any other mistakes, I doubt it. It says LL.D. there—

Q. What do you suppose LL.D. means, what is that?

A. There isn't any LL.D., I think there is a J. D. or LL.D.

The Court: It appears from this record he attended Loyola University from 1922 to 1925. Was that true?

A. No, sir.

Q. Did you give that information?

A. No, I didn't give it to her. I don't remember how that came out. Mr. Campbell knew I went to De Paul.

Q. It don't make any difference, you signed this?

A. Yes, sir, I gave it to Mr. Campbell. He knew the truth about it.

Q. I mean you read it before you signed it.

A. I didn't. It was not true. It was not under oath or anything.

Q. It don't make any difference whether under oath. You read it before you signed it, didn't you?

A. I don't remember. I really don't. And Mr. Campbell knew the truth." (Rec. 990-991.)

26. The Judge (Rec. 1000-1002), thus cross-examined the defendant Glasser:

Q. Don't you think the Judge wants to know the entire background?

A. No, sir, it is not fair.

Q. Not fair to who?

A. It is not fair to anybody, to the claimant.

Q. I think the court ought to know.

A. Here are the facts—

Q. Don't you think the Judge ought to know about anybody that appears before him?

A. Yes, sir. Leo Vitale was not before Judge Barnes. You see, it is a knocked-down statement.

Q. There was one Chrysler Sedan automobile before Judge Barnes?

A. I was representing the Government in that case. I know now that Mr. Roth had filed an appearance for Rose Vitale. I didn't remember that.

Q. Do you want to tell this Court and Jury you just knew Rose Vitale was represented by Roth before Judge Wilkerson, you heard it in this court room?

A. No, I want to say when I got the Bill of Particulars, I just had it back. That is the first time I ever remember this case, when I got the Bill of Particulars. I don't remember if Victor Dowd, the Agent for the Alcohol Tax Unit, was there in Court that day before Judge Barnes. I assume he was. He said he was.

Q. And Victor Dowd, after he heard you make the statement to the Court of the libel, said to you, 'Let me take the stand, and I will save that car for the Government of the United States.'. And you said, 'Get the hell out of here.' Did you not?

A. I might have said it, I don't remember. It is possible, I might have. I might have made that

answer telling him to get the Hell out of the court room. We couldn't have saved the car for the Government. I was prosecuting according to law. A libel is an attempt by the Government to condemn a car which has been seized and forfeited to the Government. They do that because that is the way they can get clear title to the car for the car—if the car is worth more than $500.00—

Q. Mr. Glasser, will you tell this Court and jury—

A. You don't want me to answer?

Q. All right, go ahead, and answer.

A. The libel law is to the effect after a car is seized, if the car is worth more, if it is seized by the Agents for the Alcohol Tax Unit, it is worth more than $500.00, the Alcohol Tax Unit has it appraised, they have it appraised by its Appraisal Department, and if it is worth more than $500.00 they will send it over to the District Attorney's office, so they may file a libel, if the car is worth less than $500.00—

Q. Aren't you talking about the matter of seizure rather than what a libel is?

A. That is the only way I can tell what a libel is. I don't remember how many cases I handled when I was in the United States Attorney's Office, quite a number.

Q. Isn't it a fact, Mr. Glasser, if an automobile is found on the premises where there is also found an unregistered still, that if it is found within the enclosure, and you have got evidence which can establish that the particular automobile found within the enclosure of the unregistered still, was on numerous occasions followed by the Alcohol Tax Unit, and observed and seen cans of alcohol being placed on it, and license number changed on it, and traced to the premises where the still is actually found, do you consider that fairly good evidence that the automobile was being used to defraud the United States Government out of the taxes on alcohol?

A. Yes, sir.

Q. That is what was done in the Vitale case?

A. No, sir, you are showing me a criminal file, and not the civil file, that is not fair. The criminal

file is not used in connection with the civil file. I never did. It shouldn't be. They have a special investigation, and special department that works on it, Judge." (Rec. 1000-1002.)

Point VII.

The judge imposed such limitations on the right of the appellant and appellants as (a) to fatally prejudice them in their defense, and (b) to constitute a denial of due process of law. (Petition, p. 6.)

A fair and full cross-examination of a witness upon the subject of his examination in chief is the absolute right of the party against whom he is called, and the denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and thoroughly exercised that the allowance of cross-examination becomes discretionary with the court.

Alford v. *U. S.*, 282 U. S. 687, 75 L. Ed. 624.

District of Columbia v. *Clawans*, 300 U. S. 617, 81 L. Ed. 843.

Moyer v. *U. S.*, 78 Fed. (2d) 624 (C. C. A. 9).

Asgill v. *U. S.*, 60 Fed. (2d) 776 (C. C. A. 4).

Minner v. *U. S.*, 57 Fed. (2d) 506, 511, 512 (C. C. A. 10).

Heard v. *U. S.*, 255 Fed. 829 (C. C. A. 8).

Harrold v. *Oklahoma*, 169 Fed. 47 (C. C. A. 8).

Collenger v. *U. S.*, 50 Fed. (2d) 345, 350, 351.

Gilmer v. *Higley*, 110 U. S. 47, 28 L. Ed. 62.

In *Harrold* v. *Oklahoma*, 169 Fed. 47, 51, the Court said:

> "Statements in the opinions of courts are called to our attention to the effect that the limit of cross-examination is discretionary with the trial court, but it is only discretionary without the limits of the right of the party against whom a witness is called to a full

and fair cross-examination of him upon the subjects of his direct examination, and the right of the party in whose behalf he testifies to restrict his cross-examination to the subjects of his direct examination. This question has repeatedly received the studious and thoughtful consideration of this court (citing cases) and it adheres to the conclusion that the true rules and the reasons for them are stated in *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, 129 Fed. 668, 674, 64 C. C. A. 180, 186, in substantially these words: A fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after this right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court. *Gilmer* v. *Highley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62."

In *Gilmer* v. *Higley*, 110 U. S. 47, 50, cited in the foregoing case, the United States Supreme Court said:

> "To permit a party to the suit to tell his own tale of a transaction like this and conceal what is important to the defendant in regard to the same occurrence at the same time would be a gross perversion of justice, and would bring into discredit the policy of permitting parties to actions to testify in their own behalf."

In *Collenger* v. *U. S.*, 50 Fed. (2d) 345, the Circuit Court of Appeals of this Circuit, in citing and applying the case of *Alford* v. *U. S.*, 282 U. S. 687, said:

> "The Supreme Court (in the Alford case) evidently deeming the situation to afford 'special and important reasons' for its intervention, awarded certiorari, and, brushing aside technicalities, reversed the judgment upon the ground alone that the defendant had been unduly restricted in his lawful right of cross-examination."

Point VIII.

It was reversible error to cross-examine the witnesses for the petitioners, which far beyond the subject matter and time embraced by their direct examination, the effect and purpose of such cross-examination being the showing of matters against the petitioners, which, if provable at all, should have been proved by the Government as part of its case in chief. This cross-examination had also for its purpose and effect the impeachment of these witnesses by showing them guilty of offenses not involving moral turpitude, which could not be shown directly as impeaching circumstances. Also, its purpose and effect was to make these witnesses, beyond the scope of cross-examination, testify to facts in favor of the Government, without making them direct witnesses for it. (Reason 8, p. 7, Petition.)

Tucker v. *U. S.*, 5 Fed. (2d) 88, 822, 823, 824 (C. C. A. 8).

Wilson v. *U. S.*, 4 Fed. (2d) 888 (C. C. A. 8).

Terzo v. *U. S.*, 9 Fed. (2d) 357 (C. C. A. 8).

Havener v. *U. S.*, 15 Fed. (2d) 503 (C. C. A. 8).

Gideon v. *U. S.*, 52 Fed. (2d) 427 (C. C. A. 8).

Haussener v. *U. S.*, 4 Fed. (2d) 884, 887 (C. C. A. 8).

Laurence v. *U. S.*, 18 Fed. (2d) 407 (C. C. A. 8).

Middleton v. *U. S.*, 49 Fed. (2d) 538 (C. C. A. 8).

Harrold v. *Oklahoma*, 169 Fed. 47, 52, 53 (C. C. A. 8).

People v. *Newman*, 261 Ill. 11, 103 N. E. 489.

People v. *Geidras*, 338 Ill. 340.

State v. *Cannon*, 66 Mo. 116.

People v. *Adams*, 76 Cal. App. 178, 244 Pac. 106.

People v. *Fleming*, 166 Cal. 359, 381, 136 Pac. 291, 302.

Hernsley v. *Commonwealth* (Ky. Ct. of App.), 31 Ky. Law. Rep. 386.
State v. *Borri*, 199 S. W. 136, 138 (Mo.).
People v. *Quinn*, 295 Pac. 1043.

See Point VI, and the argument made and record set out in support thereof, which shows a similar cross-examination conducted, not by the Assistant District Attorney, but by the Judge.

Point IX.

The prosecutor committed reversible error through the following conduct: (a) by leading questions persistently put in the mouths of accomplice witnesses, that were vital to the prosecution and fatal to the defense, and in that manner substituted the testimony of the prosecutor for that of an accomplice witness; (b) upon cross-examination by repeatedly putting to a petitioner, while on the witness stand, absolutely unnecessarily the same question for the purpose of emphasis, in regard to most material matter. After the prosecutor went into a matter upon examination in chief, the judge refused, upon the objections of the prosecutor, to permit the petitioners to inquire into the matter. After Government witnesses had been turned over to the defendants for cross-examination and were cross-examined, the prosecutor on pretended re-examination, went far beyond matters developed in cross-examination. He was permitted to introduce evidence out of the usual order continuously without showing good and exceptional cause for doing so. Upon request to do so on the part of petitioner Glasser, the prosecutor refused him the right to examine a document relied upon by the Government, in the sole possession of the prosecutor. (Petition, p. 7.)

A. It is as much the duty of a prosecuting attorney to refrain from improper methods to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. *U. S.*, 295 U. S. 78, 79 L. Ed. 1314.
Pharr v. *U. S.*, 48 Fed. (2d) 767 (C. C. A. 6).

B. It was reversible error for the prosecutor, upon cross-examination, to repeatedly put to petitioners while on the stand the same question in regard to material matter.

People v. *Barberi*, 149 N. Y. 256, 275, 276.

C. Where the prosecutor goes partially into a material matter on examination in chief, it is reversible error to refuse the right to go into this same matter on cross-examination.

Harrold v. *Oklahoma*, 169 Fed. 47 (C. C. A. 8).
State v. *Nugent*, 116 La. Rep. 99.

D. In criminal prosecutions, where a witness for the prosecution has been turned over to the defendant for cross-examination, the re-examination of the prosecutor must be confined exclusively to the cross-examination; and to materially disregard this rule is reversible error.

State v. *Denis*, 19 La. Ann. 119.
State v. *Wright*, 4 La. Ann. 589, 590, 591.

E. While a trial court has a reasonable discretion in the matter of allowing either party to introduce additional testimony in chief after the close of the case, the court should not allow the introduction of testimony out of the usual order, except for good and exceptional cause, and to do so is reversible error.

Williams v. *Commonwealth*, 90 Ky. Rep. 596.
Dalton v. *Commonwealth*, 226 Ky. Rep. 127, 130, 131.

Collins v. *Commonwealth*, 15 Ky. Law Rep. 691, 693.

Fletcher v. *Commonwealth*, 26 Ky. Law Rep. 1157.

People v. *Harper*, 145 Mich. 402, 108 N. E. 689.

Pharr v. *U. S.*, 48 Fed. (2d) 767 (C. C. A. 6).

And,

F. To refuse a defendant the right to examine a material Government document which is relied upon as evidence against him is reversible error. (Reason 9, Petition, p. 7.)

The prejudicial acts of the Assistant District Attorney made the basis of the foregoing reason are these:

1. Government witness Workman testified (Rec. 209) that he was on probation. He was then asked by the District Attorney whether from the time he was placed on probation to the 31st day of March, 1939, the defendant Glasser ever called him into the office to talk about the case. The Judge asked the Assistant District Attorney what occasion Mr. Glasser would have to call him into the office after that, to which the District Attorney rejoined, "It is merely a circumstance to show interest."

> "The Court: Never mind. Objection overruled. He may answer.
> The Witness: No, sir."

This question was also put on re-direct examination, and was not responsive to any matters touched upon by cross-examination.

2. The Assistant District Attorney put the testimony he desired in the mouth of Elmer Swanson, the Government witness while testifying on direct examination, in the following manner (Rec. 229):

> "A. Well, the case was supposed to be taken care of for $800.00, and nobody was supposed to go to jail.

Q. Was there something said about $1,200.00 at this time?

A. Well, the $800.00 was supposed to be the first payment, and when everything was all over, why the rest of it was supposed to be paid.

Q. Was there $500.00 in currency paid to Kretske at that time?

A. I think it was $500.00, if I'm not mistaken.

Q. And the balance was to be $700.00, is that it?

Mr. Stewart: Well, your honor, we would like to have the witness' testimony and not Mr. Ward's. We object.

The Court: If the witness knows, speak out and tell us what the facts are.

The Witness: A. Well, I think it was $500.00, and there was a $700.00 balance, it was $1,200.00 in all."

3. The Assistant District Attorney re-cross examined and the Judge permitted him to re-cross examine the defendant Roth in regard to a subject matter which had been thoroughly covered in previous examinations. An objection was interposed on that ground and overruled. (Rec. 882-884.) The Assistant District Attorney then proceeded to an extended examination on these foreclosed matters, which was prejudicial to the defendants. (Rec. 882-884.)

4. The Assistant District Attorney conducted an unfair and insidious cross-examination of Judge Michael Igoe, a witness for the defense, seeking by innuendo to prove that the Judge was acquainted with the criminals who were involved as violators of the liquor laws of the United States, and who were concerned in the alleged conspiracy, as follows (Rec. 907-908):

"Q. Now, Judge, do you know a man named Clem Swanson, I mean Elmer Swanson?

A. Not by name.

Q. Do you know a man named Clem Dowiat?

A. Not by name.

Q. Do you know a man named Kamarek?

A. No.

Q. Do you know a man named H. L. Welch?
A. Those are evidently the names of those defendants, from this report; I don't know any of them, if that is what you are trying to find out.
Q. Why do you say that?
A. Because the names are here. Here is Charles Swanson, Clem Dowiat. How did you think I might know them?
Q. Is H. L. Welch one of those?
A. I don't think—
Q. I know you read that report.
A. What makes you think I might know them?
Q. I only asked you—
A. Well, you did ask me, I ask you what makes you think I might know them?
Q. You say you don't know them.
A. I am telling you I don't know him.
Q. That is the point. You say you don't know them, but Mr. Glasser does know them?
A. I don't know anything about them.
Q. But you don't know?
A. You know I don't know them. You don't have to insinuate I do, either. (Rec. 907-908.)"

5. The Assistant District Attorney refused to permit the defendant Glasser to examine the file and reports in his possession for the purpose of refreshing his recollection on cross-examination, notwithstanding the order of the court to that effect.

6. The Assistant District Attorney placed Thomas Bailey, a witness for the Government, on the stand for alleged rebuttal and interrogated him in regard to his connection with the Treasury Department, which was received under objection. He was asked regarding his services with the Treasury Department after 1926. He testified that he had been stationed at Philadelphia, Wilmington, Delaware, Baltimore, and in the Western District of Virginia. That a John Paul was District Judge and Joseph Chitwood, District Attorney of that District. That he had two assistants, Frank Tavner and

Ar Gilmer. The name of the District Clerk was Clarence Gentry. That he had investigated cases which resulted in trials before Judge Paul. That he had been awarded during the World War the American Distinguished Service Cross, the French Croix du Guerre, with a gilt star, and the purple heart of an oakleaf cluster. That he had been a lieutenant and battalion commander in the World War. That these decorations were received for valor, and that the purple heart was received because of the witness receiving two wounds in action. That he had never been run out of the south or ordered out of a courtroom by a Judge. All this was received subject to objection and exception. (Rec. 1039-1040.)

7. The Assistant District Attorney put answers into the mouth of witness Swanson in the following manner (Rec. 230):

"Q. Now have you exhausted your recollection of the entire conversation?

The Court: In other words, have you told us all you can remember he did?

A. Well, I don't think I can remember anything else.

Mr. Ward: Would it refresh your recollection if I was to tell you that Kretske said, 'Don't worry about a thing. Everything will be taken care of.'

A. Yes, that was said.

Q. And Dan was to get part of the money that was given him?

A. Well, I don't know if he said Dan or Red or something like that, either one.

Q. Either what?

A. Either one, Red or Dan.

Q. Didn't you know at that time who Kretske was referring to as Red?

A. Yes.

Q. Who?

A. Well, it was Glasser."

He further asked the same witness (Rec. 231):

"Q. While you were there before Judge Woodward, did Mr. Glasser say to you in the presence of

Anthony Hodorowicz, Clem Dowiat or Claude Swanson, you are in this indictment with violating certain sections of the Internal Revenue laws, that is on a certain day you had in your possession a certain still unregistered, and that you had in your possession mash and alcohol mash to be used in the manufacture of alcohol upon which the tax was not paid. Language to that effect. Was that ever asked you in the presence of Judge Woodward?

Mr. Stewart: Your Honor. Mr. Ward spent a long time telling this jury what his evidence is. Now if he just asks the witnesses. That is my objection—to his doing the testifying.

Mr. Ward: No, this is in effect, asking the witness about the arraignment. I am asking if that was said in his presence, and whether he was arraigned there. He wouldn't know. (Rec. 231.)"

8. While Government witness Del Rocco was testifying in regard to alleged transactions between offenders against the law and defendants Horton and Kretske, the Assistant District Attorney said to the witness:

"Was there anything said there about their not being brought to trial?" (Rec 244.)

9. These words were put in the mouth of the witness by the Assistant District Attorney in the examination of William Wroblewski (Rec. 636):

"Q. Well, now, would it refresh your recollection if I was to call your attention to a statement that you made to Mr. Devereux and Mr. Bailey on August 3, 1939, in which you said, 'On one occasion while I was in Roth's office, he, Kretske, said to me if I had any cases fixed, don't talk about them or you will get into some trouble.' Do you remember that?

A. I don't believe it was Mr. Kretske.

Q. Who told you that?

A. Well, the way that come out. I went down to see Mr. Al Roth, and I told him I was having trouble with the law. I said that the law is looking for some information from me, and Mr. Al Roth told me if I gave information to anybody I would be implicated in the case.

Q. Was it he used the word 'implicated'?
A. That is right.
Q. So that was an occasion when you were in Roth's office that Mr. Roth said that to you?
A. Yes, sir.
Q. Now, are you sure he didn't say: 'If I had any cases fixed, don't talk about them or you will get into more trouble'? That he didn't use that language?
A. Well, I might have expressed myself that way at the time, but I recall now that the right word is implicated.
Q. Implicated?
A. Yes, sir."

10. These leading questions were put to the Government witness Brantman by the Assistant District Attorney (Rec. 660-661):

"Q. Didn't Mr. Kretske tell you to get the five thousand dollars?
A. I don't know, he might have said the work was worth that.
Q. Do you recall a long conversation in the District Attorney's office?
A. I might recall some of it. They asked many questions.
Q. Do you recall Mr. Devereux asking: 'Q. Didn't Mr. Kretske tell you to get five thousand dollars from Nick? A. Yes, sir.' Do you recall that?
Mr. Stewart: May I object? He has no right to bring before this jury what was said in the District Attorney's office.
The Court: Objection overruled.
Q. Do you remember that question?
A. I don't remember that question. I am trying to recall the conversation."

11. On examination Government witness Del Rocco, the Assistant District Attorney thus demeaned himself. (Rec. 245.)

"Q. When Mr. Kretske told you that the heat was on, did you say the heat was on the redhead, and he guessed it was hard for it to be carried out?

Mr. Stewart: I object, your honor, that is unfair.
The Court: It is leading. Objection sustained.
Mr. Ward: Q. Do you recall anything else that was said?
A. The heat was on the redhead.
Q. Are you sure he said that?
The Witness: At that time you didn't know Mr. Glasser.
Q. Do you know whom he meant?
A. (Answer inaudible.)"

12. Government's witness Edwin Walker, who had testified as to his method of procedure in the cases brought before him, was asked by the Assistant District Attorney (Rec. 289):

"It does not mean that there may not be probable cause, but that it was not shown to you."

13. On direct examination of Government witness Workman the Assistant District Attorney put the testimony in the witness' mouth in the following way (Rec. 206):

"Mr. Ward: Q. Now, did you discuss with any person, your case? I don't want you to say what was said, but did you discuss with any person anything about your case before you went to Ed Hess' office?
A. No, I don't recollect that I did.
Q. Did Ramsey talk to you about it?
Mr. Stewart: I object. He said he did not recollect that he did. The prosecutor has no right to cross-examine his own witness.
Mr. Ward: Q. Would it refresh your recollection if I were to say to you that you had a conversation with me in my office in which you told me that Ramsey was Schiabone and that you talked to Ramsey before you went to Ed Hess' office? Would that refresh your recollection?
Mr. Stewart: May I have a ruling, your Honor? That is proper.
The Court: Overruled.
Mr. Stewart: Exception."

14. The Assistant District Attorney on re-direct examination permitted by the Court went into subject matter of the direct examination which had not been opened up by Cross-examination and had the Government Witness, Victor Rabunas, testify that he was inside of the delicatessen store on the first occasion and saw Louis Kaplan coming. That Kretske came to the corner of the store in a green car, and opposite him sat the defendant Glasser. (Rec. 520-523.)

Point X.

It was reversible error for the court (a) to admit a prejudicial act disconnected with the conspiracy charged; (b) to admit in evidence against petitioners a highly prejudicial statement, act or declaration made by another alleged conspirator; and (c) to exclude important evidence operating in behalf of the defendants. (Petition, p. 8.)

A. Where evidence of acts disconnected with a conspiracy is admitted, the same is reversible error available to any defendant prejudiced thereby.

Pretty.nan v. *U. S.*, 180 Fed. 30 (C. C. A. 8).
U. S. v. *McNamara*, 91 Fed. (2d) 986 (C. C. A. 2).
U. S. v. *Sprengel*, 103 Fed. (2d) 876 (C. C. A. 9).
Cooper v. *U. S.*, 9 Fed. (2d) 216 (C. C. A. 8).
Minner v. *U. S.*, 57 Fed. (2d) 506 (C. C. A. 10).

B. It is reversible error to admit in evidence against alleged co-conspirators a statement, act or declaration after the termination of the alleged conspiracy.

Logan v. *U. S.*, 144 U. S. 263, 36 L. Ed. 429.
Brown v. *U. S.*, 150 U. S. 931, 37 L. Ed. 1010.
Collenger v. *U. S.*, 50 Fed. (2d) 345 (C. C. A. 7).

C. Where in a conspiracy charge important evidence operating in behalf of defendants is excluded from the jury, such constitutes reversible error.

Olson v. *U. S.*, 133 Fed. 849 (C. C. A. 8).
Cooper v. *U. S.*, 9 Fed. (2d) 216.
Hills v. *U. S.*, 97 Fed. (2d) 710, 719 (C. C. A. 9).

This reason deals with the admission of evidence of a very grave character in relation to matters not set out in the bill of particulars, by which the indictment was limited. It is clear that it operated as a definite surprise to the defendants, who were led to believe from the bill of particulars that no evidence would be admitted except that in relation to the particulars set forth in the bill of particulars. In addition thereto, under the circumstances, all the evidence thus admitted was irrelevant, not connected with the issues, and highly prejudicial. (Rec. 678-689.)

The substance of this error is that the Court erred in admitting the testimony of Alexander Campbell for the reasons included in the written motion. The testimony appears at Rec. 678-679. The motion to exclude the testimony speaks for itself and is as follows:

> "1. That said proposed testimony is not a declaration made in pursuance of the object of the alleged conspiracy.
>
> 2. That the said proposed testimony is not part of the execution of the alleged plan of the alleged conspiracy.
>
> 3. The fact that the declarant is indicted adds nothing to the competence of his alleged declaration.
>
> 4. The fact that one alleged conspirator tells another something allegedly relevant to the alleged conspiracy does not make the alleged declaration competent.
>
> 5. That mere conversation of an alleged conspirator with another does not implicate him or

others in a conspiracy with others not independently shown to be a party to the alleged conspiracy.

6. That no independent proof of the alleged conspiracy has been offered.

7. That the proposed testimony is concerning a transaction not related to the alleged conspiracy.

8. That the bill of particulars, setting forth the causes, persons, and places involved, so that the defendants might be prepared to meet the particulars alleged, does not set forth the case of *United States* v. *Edward Wroblewski and William Wroblewski* in the Northern District of Indiana.

9. That the proposed testimony is prejudicial and will not tend to prove any issue in the above cause."

This was overruled and the prejudicial testimony admitted.

The Court overruled the motions of all the defendants to strike and exclude the testimony of Government witness Victor J. Dowd, which appears at Rec. 218-221. This testimony referred to matters not set forth in the bill of particulars, and is of a most prejudicial nature and the refusal to strike this testimony undoubtedly prejudiced the defendants.

The Court erroneously struck out parts of the testimony of the defendant Glasser, which testimony was essentially proper, in view of remarks made by the Judge. This matter is to be found at Rec. 1022-1023, and is as follows:

"The Court: Q. Just a minute, on that point. Was it your solemn judgment that the cause of good government would be best promoted by turning these twelve defendants loose who had been convicted and in exchange have their testimony to convict Abesketes?

A. Yes, sir, it was the judgment of myself, Judge Igoe and Mr. Herrick.

Q. To turn twelve defendants loose on the streets who had been convicted of operating or involved in the operation of some still with Abesketes, in ex-

change for their testimony which might convict Abesketes, when Abesketes was at that time under indictment in the Eastern District of Wisconsin; is that your solemn judgment?

A. It is my solemn judgment, yes, resulting from conference with Mr. Herrick and Judge Igoe. Mr. Herrick went to Washington for the same purpose I did, as I am being blamed with it, but he went down there with me.

Mr. Ward: I move these remarks be stricken out, so that they cannot be in this record to be argued later.

The Court: It may be stricken. I ask him for his own judgment."

CONCLUSION.

We respectfully submit that the decision of the Circuit Court of Appeals for the Seventh Circuit should be in all matters reversed.

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Of Counsel.

APPENDIX.

Sec. 25, Chap. 78, Ill. Anno. Stat., is as follows:

"Board to prepare jury list—The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors between the ages of 21 and 60 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list. The list may be revised and amended annually in the discretion of the commissioners. The name of each person on said list shall be entered in a book or books to be kept for that purpose, and opposite said name shall be entered the age of said person, his occupation, if any, his place of residence, giving street and number, if any, whether or not he is a householder, residing with his family, and whether or not he is a freeholder. (1887, June 15, Laws 1887, p. 214, Sec. 2; 1897, June 9, Laws 1897, p. 243, Sec. 1.)"

Sec. 1, 1939 Ill. Rev. Stat., p. 1929, is as follows:

"Section 1. Section 1 of 'An Act concerning jurors, and to repeal certain acts therein named,' approved February 11, 1874, as amended, is amended to read as follows:

§1. The county board of each county shall at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct in the county, giving the place of residence of each name on the list, to be known as a jury list. Approved May 12, 1939."

Sec. 2, 1939 Ill. Rev. Stat., p. 1933, is as follows:

"Section 2 of 'An Act in relation to jury commissioners and authorizing judges of courts of record to

appoint such jury commissioners and to make rules concerning their powers and duties,' approved June 15, 1887, as amended, is amended to read as follows:

§ 2. The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors of each sex between the ages of 21 and 65 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list. The list may be revised and amended annually in the discretion of the commissioners. The name of each person on said list shall be entered in a book or books to be kept for that purpose, and opposite said name shall be entered the age of said person, his occupation, if any, his place of residence, giving street and number, if any, whether or not he is a householder, residing with his family, and whether or not he is a freeholder. Approved May 12, 1939."

Section 88, Title 18, U. S. C. A., is as follows:

"(Criminal Code, section 37.) Conspiring to commit offense against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, § 37, 35 Stat. 1096.)"

Section 91, Title 18, U. S. C. A., is as follows:

"(Criminal Code, section 39.) Bribery of United States Officer.—Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official

function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years. (R. S. § 5451; Mar. 4, 1909, c. 321, § 39, 35 Stat. 1096.)"